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# Using the Antitrust Laws to Combat Overseas Bribery by Foreign Companies: A Step to Even the Odds in International Trade

FRANKLIN A. GEVURTZ\*

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## I. INTRODUCTION

Incidents of illegal payments<sup>1</sup> combined with a move to weaken the Foreign Corrupt Practices Act<sup>2</sup> (FCPA) have sparked renewed

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1. In July 1986, the Securities and Exchange Commission (SEC) charged Ashland Oil, Inc. with illegally paying \$28.7 million to an official in Oman to obtain crude oil in 1980. At the same time, a federal grand jury began investigating commissions paid by Westinghouse Electric Corp. (allegedly amounting up to millions of dollars) to win a nuclear plant contract in the Philippines. *Wall St. J.*, July 10, 1986, at 54, col. 1.

2. Foreign Corrupt Practices Act of 1977 (FCPA), Pub. L. No. 95-213, tit. I, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78a note, 78m(b), 78dd-1, 78dd-2, 78ff(a) (1982 & Supp. III 1985)). In the 99th Congress, the business community and the Reagan administration supported S. 430, 99th Cong., 1st Sess., 131 Cong. Rec. S1299 (daily ed. Feb. 7, 1985), a bill sponsored by Senator John Heinz which would have reduced the FCPA's recordkeeping requirements. See Business Accounting and Foreign Trade Simplification Act: Joint Hearings on S. 430 Before the Subcomm. on International Finance and Monetary Policy and the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs, 99th Cong., 2d Sess. 78 (1986) [hereinafter Joint 1986 Hearing] (prepared statement of Secretary of Commerce Malcolm Baldrige). In addition, the House of Representatives on May 22, 1986 passed H.R. 4800, 99th Cong., 2d Sess., 132 Cong. Rec. H3025 (daily ed. May 21, 1986) (as amended), an omnibus trade bill which included a provision narrowing liability under the FCPA if money is paid to an agent who uses it to make a bribe. 132 Cong. Rec. H3225 (daily ed. May 22, 1986); see also *Wall St. J.*, July 10, 1986, at 54, col. 1 (noting comments of the sponsors of the House bill). The possibility of incurring liability through an agent's unauthorized bribery of a foreign official has raised significant concern among U.S. corporations abroad. Joint 1986 Hearing, *supra*, at 134 (response by Secretary Baldrige to written questions of Senator Heinz).



debate over the United States response to overseas bribery. This debate invariably centers on regulation of corrupt acts committed by U.S. citizens.<sup>3</sup> Curiously, little attention is given to the impact that corrupt practices by other nationals have on U.S. companies doing business abroad. This Article will explore how U.S. firms may be protected from losing business opportunities abroad due to bribes made by foreign companies.

Traditionally, only the nation whose official received an illegal payment or the nation in which the bribe occurred imposed sanctions on the briber.<sup>4</sup> Often, however, nations do not effectively en-

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3. Among the considerable body of literature exploring responses to overseas bribery by U.S. nationals, see Ad Hoc Comm. on Foreign Payments, Ass'n of the Bar of the City of New York, Report on Questionable Foreign Payments by Corporations: The Problem and Approaches to a Solution (1977); G. Greanes & D. Windsor, The Foreign Corrupt Practices Act: Anatomy of a Statute (1982); Herlihy & Levine, Corporate Crisis: The Overseas Payment Problem, 8 Law & Pol. Int'l Bus. 547 (1976); Lashbrooke, The Foreign Corrupt Practices Act of 1977: A Unilateral Solution to an International Problem, 12 Cornell Int'l L.J. 227 (1979); McLaughlin, The Criminalization of Questionable Foreign Payments by Corporations: A Comparative Legal Systems Analysis, 46 Fordham L. Rev. 1071 (1978); McManis, Questionable Corporate Payments Abroad: An Antitrust Approach, 86 Yale L.J. 215 (1976); Rill & Frank, Antitrust Consequences of United States Corporate Payments to Foreign Officials: Applicability of Section 2(c) of the Robinson-Patman Act and Sections 1 and 2 of the Sherman Act, 30 Vand. L. Rev. 131 (1977); Roiter, Illegal Corporate Practices and the Disclosure Requirements of Federal Securities Laws, 50 Fordham L. Rev. 781 (1982); Witherspoon, Multinational Corporations—Governmental Regulation of Business Ethics Under the Foreign Corrupt Practices Act of 1977: An Analysis, 87 Dick. L. Rev. 531 (1983); Wolf, Improper Foreign Corporate Payments: An Analysis of the Problem and Its Solutions, 2 Suffolk Transnat'l L.J. 43 (1978).

4. Virtually every nation treats bribery of its officials as a crime. J. Noonan, Bribes 702 (1984); Driscoll, The Illegality of Bribery: Its Roots, Essence and Universality, 14 Cap. U.L. Rev. 1, 13-38 (1984); Note, Prohibiting Foreign Bribes: Criminal Sanctions for Corporate Payments Abroad, 10 Cornell Int'l L.J. 231, 235 & n.26 (1977); see also Goldstein, European Views of United States Anti-Bribery and Anti-Boycott Legislation, 1 Nw. J. Int'l L. & Bus. 363 (1979) (every major European nation prohibits bribery of its officials); Suse, Questionable Payments in the Middle East: Potential Liability of American Corporations, 4 J. Comp. Corp. & Sec. Reg. 101 (1982) (examining anti-bribery laws of seventeen Middle Eastern nations). Somewhat less consensus exists with respect to bribing employees of private enterprises; i.e., commercial bribery. Many nations also treat this as a crime. See, e.g., The Prevention of Corruption Act, 1906, 6 Edw. 7, ch. 34, amended by the Prevention of Corruption Act, 1916, 6 & 7 Geo. 5, ch. 64; Code pénal arts. 177, 179 (Fr.); Gesetz gegen den unlauteren Wettbewerb § 12, 1909 Reichsgesetzblatt [RGBl] 499, 502 (as amended) (W. Ger.) (Act Against Unfair Competition); see generally 1 Pinner's World Unfair Competition Law, Topic No. 12, Bribery (H. Dawid 2d ed. 1978) (survey of foreign commercial bribery law). For a discussion of U.S. federal and state laws criminalizing commercial bribery, see Perrin v. United States, 444 U.S. 37, 41-45 (1979). Even where such conduct is not criminal, it typically gives rise to civil liabilities. See generally H. Lidgard, C. Rohwer & D. Campbell, A Survey of Commercial Agency 32, 66, 126, 216, 434-35, 480-81 (1984). No nation other than the United States, however, prohibits bribery of another country's officials or bribery occur-

force such domestic legislation. In 1977, the United States adopted a different approach.<sup>5</sup> Congress enacted the FCPA to impose criminal liability on U.S. firms or nationals which use any means of interstate commerce to further a bribe of a foreign official. The FCPA, however, is not the only sanction which the United States imposes on its nationals who pay bribes abroad; it is merely the most explicit. For example, the failure of public companies to disclose such payments in filings required by the Securities Act of 1933<sup>6</sup> and the Securities Exchange Act of 1934<sup>7</sup> can lead to prosecution by the Securities and Exchange Commission (SEC).<sup>8</sup> Shareholders may also bring suits alleging that corporate managers violated their fiduciary duty to the company under state law in making illegal payments.<sup>9</sup> Moreover, unlike those of other countries,<sup>10</sup> U.S. federal income tax laws do not allow a deduction for

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ring outside its territory. Noonan, *supra*, at 680; see also Goldstein, *supra*, at 364 (no western European nation has such a statutory prohibition).

5. See generally Gevurtz, *The United States Approach to Combating Bribery in the International Sale of Goods*, in *Survey of the International Sale of Goods* 333, 337-43 (1986) (discussing United States attempts to control bribery by U.S. corporations).

6. Securities Act of 1933, ch. 38, tit. I, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a-77aa (1982 & Supp. III 1985)).

7. Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a-78kk (1982 & Supp. III 1985)). For a further discussion of the interplay between U.S. securities laws and U.S. corporations' questionable practices abroad, see *infra* note 18.

8. See, e.g., *SEC v. Lockheed Corp.*, [1975-1976 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,509 (D.D.C. Apr. 13, 1976) (consent judgment ordering, *inter alia*, that the corporation establish a special committee to investigate unlawful foreign political contributions, and enjoining the corporation from future failures to report such payments to the SEC); *SEC v. United Brands Co.*, [1975-1976 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,420 (D.D.C. Jan. 27, 1976) (enjoining defendants from again failing to report to the SEC unlawful payments to foreign government officials).

9. See, e.g., *Gaines v. Haughton*, 645 F.2d 761, 772-79 (9th Cir. 1981) (shareholders' suit concerning Lockheed's improper payments, which were used to boost sales abroad), cert. denied, 454 U.S. 1145 (1982); *Abbey v. Control Data Corp.*, 603 F.2d 724, 731 (8th Cir. 1979) (shareholder sought recovery to corporation of penalties paid, on corporate officers' behalf, for illegal payments abroad), cert. denied, 444 U.S. 1017 (1980); *Rosengarten v. International Tel. & Tel. Corp.*, 466 F. Supp. 817, 820-22 (S.D.N.Y. 1979) (questionable payments allegedly made to government officials and campaigns, both in the United States and abroad); *Gall v. Exxon Corp.*, 418 F. Supp. 508, 509-14 (S.D.N.Y. 1976) (shareholder alleged bribes were given to political parties in foreign countries); see also *Auerbach v. Bennett*, 47 N.Y.2d 619, 393 N.E.2d 994, 419 N.Y.S.2d 920 (1979) (bribery suit dismissed on other grounds); *Steinberg v. Steinberg*, 106 Misc. 2d 720, 434 N.Y.S.2d 877 (Sup. Ct. N.Y. County 1980) (complaint alleging breach of fiduciary duty in paying bribes dismissed upon finding of improper motives of plaintiff).

10. See Lachat-Héritier, *Commercial Bribes: The Swiss Answer*, 5 J. Comp. Bus. & Cap. Mkt. L. 79, 94 (1983) (citing Swiss federal tax circular, *Archives de droit fiscal* 15, at 141 (1946/1947)) (Switzerland allows a deduction under certain circumstances); Rubin, *Interna-*

illegal overseas payments.<sup>11</sup> In addition, imaginative prosecutors have brought actions<sup>12</sup> based upon violations of the mail and wire fraud statutes.<sup>13</sup> Unreported transfers of funds abroad for purposes of making illegal payments violate the Bank Secrecy Act.<sup>14</sup> Other statutes prohibit bribes when a sale involves U.S. foreign assistance or arms exports.<sup>15</sup>

The net effect of these laws is that U.S. businesses face barriers to overseas bribery not faced by their foreign competitors and are thereby at a competitive disadvantage.<sup>16</sup> Removal of these barriers,

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tional Aspects of the Control of Illicit Payments, 9 Syracuse J. Int'l L. & Com. 315, 315 (1982) (most developed countries allow a deduction); Note, Corruption and the Foreign Corrupt Practices Act of 1977, 13 U. Mich. J.L. Ref. 158, 191 n.190 (1979) (West Germany allows a deduction).

11. I.R.C. § 162(c)(1) (1982). By the terms of the statute, the deduction will be lost if the bribe to a foreign official falls within the prohibitions of the FCPA. *Id.* The regulations which accompany section 162(c)(1) define "foreign official" very broadly, encompassing, for example, even those who merely *purport* to be legitimate foreign officials. Treas. Reg. § 1.162-18(a)(3) (as amended in 1975).

Denying a tax deduction may be justified even if one disagrees with the criminalization of overseas bribery in the FCPA. It is one thing to say that enforcement of the laws against bribery should be left to the country where it occurs, but quite another to suggest that the briber's country should appear to encourage the practice by allowing a corresponding tax deduction. It should be noted, however, that the impact of section 162(c)(1) of the Internal Revenue Code may go beyond simply depriving a firm of a deduction. Schedule M1 of Internal Revenue Service (IRS) Form 1120 requires a company to itemize those expenses recorded on its books for which it is not claiming a deduction. IRS Form 1120, U.S. Corporation Income Tax Return, 1986, reprinted in 3 Tax Action Coordinator (RIA) 733,011, 733,014 (Dec. 1986). This may leave the company with the unpalatable choice between disclosing in an official document illegal conduct or, alternatively, claiming a deduction in violation of the tax laws. To make the dilemma more acute, IRS auditing procedures direct that corporate officers be asked whether their firms have made any illegal payments. 1 Int. Rev. Man.—Audit (CCH) 7294 (Jan. 1985) (Exhibit 900-1) (outlining questions to be asked corporate officers by IRS examiners).

12. See, e.g., *United States v. Control Data Corp.*, Criminal No. 78-210 (D.D.C. filed Apr. 26, 1978); *United States v. The Williams Cos.*, Criminal No. 78-00144 (D.D.C. filed Mar. 24, 1978).

13. 18 U.S.C. §§ 1341, 1343 (1982). The theory posits that bribery constitutes a fraud upon the people of the corrupt official's nation. Thus, any use of mail or electronic communication in commerce to further the bribe violates the statutes. The result is a prohibition in some ways broader than the FCPA.

14. Bank Secrecy Act § 231, 31 U.S.C. § 5316 (1982 & Supp. III 1985).

15. 22 U.S.C. §§ 2381(b) (barring the distribution of foreign assistance funds to those found to have used bribery in connection with such funds), 2779(c) (United States government will not, in relation to U.S. arms sales abroad, repay amounts spent on bribes) (1982). In contrast, French export insurance may actually allow government moneys to fund a bribe. Goldstein, *supra* note 4, at 364-65.

16. Business Accounting and Foreign Trade Simplification Act: Joint Hearings on S. 708 Before the Subcomm. on Securities and the Subcomm. on International Finance of the Senate Comm. on Banking, Housing and Urban Affairs, 97th Cong., 1st Sess. 98-103 (1981)

however, is not a realistic or even desirable solution. The FCPA serves pragmatic foreign policy interests of the United States by seeking to ensure that U.S. companies, like Caesar's wife, remain above suspicion.<sup>17</sup> Other laws impeding overseas bribery often reflect policies which require their application even if the United States does not have any direct interest in preventing its nationals from engaging in corrupt conduct. For example, disclosure requirements in the securities laws exist independent of any policy to deter bribery: their purpose is to protect shareholders. If facts relating to bribery are material,<sup>18</sup> then shareholders must be informed irrespective of whether the United States wishes to prevent overseas bribery or, for that matter, to encourage it.<sup>19</sup>

An alternative to eliminating laws regulating U.S. business practices is to impose added constraints on bribes made by foreign

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[hereinafter S. 708 Joint Hearings] (report submitted by the U.S. Dep't of State entitled "The Foreign Corrupt Practices Act: Reports from the Foreign Service") (discussing U.S. corporations' reluctance, in light of possible FCPA sanctions, to compete vigorously for foreign contracts as well as reports of contracts possibly lost due to bribery by foreign competitors). But see Graham, *The Foreign Corrupt Practices Act: A New Perspective*, J. Int'l Bus. Stud., Winter 1984, at 107 (arguing that the FCPA has had no negative impact overall on U.S. export performance or market share abroad), reprinted in Joint 1986 Hearing, *supra* note 2, at 23.

17. Significantly, one of the principal rationales given by those countries (such as France) which prosecute their nationals for crimes committed abroad is that the crime injures the country's reputation. Blakesley, *A Conceptual Framework for Extradition and Jurisdiction Over Extraterritorial Crime*, 1984 Utah L. Rev. 685, 709. It is rather ironic that France does not prosecute its nationals for committing bribery abroad.

18. A "material" fact is one to which there is a substantial likelihood that a reasonable investor, in considering a specific security, would attach importance in determining either how to vote, *TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 449 (1976), or whether to purchase or sell the security. SEC Rule 405, 17 C.F.R. § 230.405 (1986). Illegal payments may be considered "material" for several reasons. These include the penalties and reputational damage a company would likely suffer if its illegal payments became known, and the inferences shareholders may draw from such practices concerning the quality of a company's product and the honesty of its management. Senate Comm. on Banking, Housing and Urban Affairs, 94th Cong., 2d Sess., Report of the SEC on Questionable and Illegal Corporate Payments and Practices 29-31 (Comm. Print 1976), reprinted in Sec. Reg. & L. Rep. (BNA) No. 353 Supp. (May 19, 1976). See *SEC v. Jos. Schlitz Brewing Co.*, 452 F. Supp. 824, 829-30 (E.D. Wis. 1978) (brewer faced, *inter alia*, possible license suspension because of questionable practices). But see *United States v. Matthews*, 787 F.2d 38, 49 (2d Cir. 1986) (corporate officer did not violate securities laws by failing to disclose on proxy statement that he was guilty of bribery that had not been prosecuted).

19. While a disclosure requirement does not directly prohibit bribes, its ultimate effect will largely be the same. There will probably not be as many recipients for illegal payments if they know a report of the payment will appear in documents on public file or distributed to a large number of shareholders. In addition, the damage (including that to the company's reputation) which may render bribes material occurs once the bribe is disclosed.



firms. When Congress enacted the FCPA, it hoped that multilateral treaties would follow under which other trading nations would pledge to join in prohibiting corrupt acts committed by their own nationals.<sup>20</sup> Efforts to negotiate such treaties, however, have yielded little success.<sup>21</sup> This is hardly surprising. If the United States is willing unilaterally to prohibit bribery by its nationals doing business abroad, there is a disincentive for other trading nations to agree to enforce similar prohibitions because this would take away a possible competitive edge for their firms. Thus, if the United States wants to even the odds in this one aspect of international trade, it must do so by applying its own law.

This Article will explore such a course of action. Given that the U.S. laws most concerned with preserving competition on the merits are the antitrust laws, the question is whether those laws can apply to overseas bribery by foreign companies which prejudices U.S. firms. The inquiry is divided into three steps. Part II of this Article will consider whether bribery can violate the Sherman, Federal Trade Commission, and Robinson-Patman Acts. Part III will explore whether there is jurisdiction for these Acts to apply to overseas payoffs made by representatives of foreign firms. Finally, Part IV will describe the defenses which may be raised when foreign governments become involved in overseas bribery.

## II. BRIBERY AS A VIOLATION OF THE ANTITRUST LAWS

### A. *The Sherman Act*

Section 1 of the Sherman Act<sup>22</sup> proscribes contracts, combinations, and conspiracies in restraint of trade.<sup>23</sup> Thus, for a bribe to violate this section, there must first be a contract, combination, or conspiracy. A conspiracy clearly exists if two or more independent

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20. See, e.g., S. Res. 265, 94th Cong., 1st Sess., 121 Cong. Rec. 36107-08 (1975) (calling for the initiation of multilateral negotiations to establish an international system of antibribery rules and sanctions).

21. See S. 708 Joint Hearings, *supra* note 16, at 61 (statement of Ambassador Brock) (noting the failure, over the span of several administrations, to attain a multilateral antibribery agreement).

22. Sherman Act § 1, 15 U.S.C. § 1 (1982).

23. Section 1 of the Sherman Act reads in pertinent part:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

15 U.S.C. § 1 (1982).

companies cooperate in bribing.<sup>24</sup> The use of an accomplice or subsidiary to make the payment, as is common in foreign bribery,<sup>25</sup> might also suffice, depending upon the continued willingness of courts to recognize intraenterprise conspiracies.<sup>26</sup> Alternatively, the plaintiff may allege that bribery constitutes a conspiracy between the briber and the recipient. Although no case squarely stands for this proposition, there is support for this view. Decisions outside of Sherman Act jurisprudence treat the agreement between briber and recipient as conspiratorial<sup>27</sup> and two decisions under the Sherman Act seem to reach the same conclusion, albeit without specific discussion.<sup>28</sup> In addition, numerous section 1 decisions find con-

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24. See, e.g., *American Column & Lumber Co. v. United States*, 257 U.S. 377, 399 (1921) (a design to accomplish a common purpose is a "combination" or "conspiracy" within the Sherman Act), *aff'g* 263 F. 147, 151 (W.D. Tenn. 1920); see also *United States v. Sisal Sales Corp.*, 274 U.S. 268, 274 (1927) (Sherman Act also prohibits domestic corporations from combining to reduce competition in foreign trade).

25. See, e.g., *Herlihy & Levine*, *supra* note 3, at 556-57 (detailing instances of "conducting" of U.S. corporate funds through ostensibly legitimate foreign "consultants" to government officials abroad).

26. In *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), the Supreme Court held that a company could not conspire with its wholly-owned subsidiary for the purposes of section 1, *id.* at 771, but explicitly left open the issue of non-wholly-owned subsidiaries. *Id.* at 767. See also *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 141-42 (1968) (common ownership cannot automatically preclude separate corporate entities from antitrust liability under section 1); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 597-98 (1951) (common control of separate entities will not prevent application of section 1). Whether agents or accomplices can be considered conspirators for section 1 purposes depends upon their independence. See *Albrecht v. Herald Co.*, 390 U.S. 145, 149-50 (1968) (question of whether illegal combination existed turned on those parties' awareness of, and cooperation in, the central party's plan to restrain trade); *Poller v. CBS*, 368 U.S. 464, 468-73 (1962) (weighing independent motive and intent of alleged co-conspirators).

27. See, e.g., *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980) (bribery of a judge held to create a conspiracy for the purposes of civil rights action under 42 U.S.C. § 1983 (1982)); *Smithey v. State*, 269 Ark. 538, 546-47, 602 S.W.2d 676, 680 (1980) ("[T]he crime of bribery cannot occur without at least two parties being involved, one offering and one receiving; therefore, the crime alleged would necessarily involve conspiracy . . ."); see also 11 C.J.S. *Bribery* § 1 (1938) ("[T]he elements of a conspiracy are included within the substantive offense of agreeing to accept a bribe."); cf. *People v. Wettengel*, 98 Colo. 193, 195-96, 58 P.2d 279, 281 (1935) (*en banc*) (briber and recipient cannot be convicted of conspiracy to commit bribery since bribery necessarily requires conspiracy). But cf. *People v. Wolden*, 255 Cal. App. 2d 798, 804, 63 Cal. Rptr. 467, 470 (1967) ("Nor are the giver and receiver [of a bribe] guilty of a conspiracy because the two crimes require different motives or purposes" under state statute), *cert. denied*, 391 U.S. 965 (1968).

28. See *Associated Radio Serv. Co. v. Page Airways*, 624 F.2d 1342, 1353 (5th Cir. 1980) (foreign bribery, part of pattern of improper conduct, constituted a violation of section 1), *cert. denied*, 450 U.S. 1030 (1981); *City of Atlanta v. Ashland-Warren, Inc.*, 1982-1 Trade Cas. (CCH) ¶ 64,527, at 72,924 (N.D. Ga. 1981) (in denial of motion for dismissal, the court

spiracies between private firms and government officials even without bribery.<sup>29</sup> Furthermore, the United States Supreme Court has shown a willingness to find a section 1 conspiracy on the slimmest basis given sufficiently anticompetitive conduct.<sup>30</sup>

Assuming the existence of a conspiracy, the next issue is whether there is restraint of trade. If the briber obtains monopoly power as a result of the bribe, the requirement is certainly satisfied.<sup>31</sup> Com-

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found the allegation that bribery of officials created a conspiracy to supplant competition sufficient to establish an actionable section 1 claim); see also *Federal Prescription Serv. v. American Pharmaceutical Ass'n*, 663 F.2d 253, 263 (D.C. Cir. 1981) (showing of bribery inducing government officials to restrict competition would constitute a conspiracy for the purposes of taking the defendants out of the *Noerr-Pennington* exception—for legitimate government contact by organized trade groups—to the antitrust laws), cert. denied, 455 U.S. 928 (1982).

29. See, e.g., *Corey v. Look*, 641 F.2d 32, 35-36 (1st Cir. 1981) (town and steamship authority conspired to eliminate parking lot operator as competitor); *Whitworth v. Perkins*, 559 F.2d 378, 380-81 (5th Cir. 1977) (town officials may have engaged in anticompetitive combination by passing zoning statute barring alcohol sales in residential areas), vacated sub nom. *City of Impact v. Whitworth*, 435 U.S. 992, reinstated per curiam sub nom. *Whitworth v. Perkins*, 576 F.2d 696 (5th Cir. 1978), cert. denied, 440 U.S. 911 (1979); *Kurek v. Pleasure Driveway & Park Dist.*, 557 F.2d 580, 587-91 (7th Cir. 1977) (municipality's anticompetitive imposition of higher costs on golf professionals at municipal golf courses), vacated, 435 U.S. 992, reinstated per curiam, 583 F.2d 378 (7th Cir. 1978), cert. denied, 439 U.S. 1090 (1979); *Duke & Co. v. Foerster*, 521 F.2d 1277, 1281 (3d Cir. 1975) (local agencies operating public facilities conspired with concessionaire to exclude plaintiff's product from sale at facility); *Health Care Equalization Comm. v. Iowa Medical Soc'y*, 501 F. Supp. 970, 973 (S.D. Iowa 1980) (state official acting outside of legislative mandate is potentially liable under antitrust laws); *Mason City Center Assocs. v. Mason City*, 468 F. Supp. 737, 742-43 (N.D. Iowa 1979) (anticompetitive actions of city planning officials).

30. In *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), a newspaper distributor began to charge consumers a price over the publisher's recommended price, whereupon the publisher shifted temporarily to a new distributor to pressure the original distributor. *Id.* at 147-48. Since the new distributor cooperated in this attempt to force the original distributor's prices down, the Court found an unlawful combination between the publisher and the new distributor. *Id.* at 149-50. The Court also indicated that allegations naming the original distributor's customers as part of this conspiracy were not without some merit. *Id.* at 150 n.6. In *Poller v. CBS*, 368 U.S. 464, 473 (1962), the Court held that allegations of a conspiracy between CBS and two individuals buying a television station competing with the plaintiff raised issues of fact precluding summary judgment.

31. See *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 693-95 (1962) (monopolization of trade in vanadium, including in the Canadian market); *United States v. Sisal Sales Corp.*, 274 U.S. 268, 272-74 (1927) (successful effort to corner the U.S. market in an imported fiber). In this event, the bribe would also violate section 2 of the Sherman Act, which proscribes monopolization and attempts to monopolize. 15 U.S.C. § 2 (1982). Unlike section 1, this latter section reaches single firms as well as joint conduct, but requires greater market impact. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940) (pointing out that a monopoly proscribed by section 2 is a species of the more general restraints of trade prohibited by section 1). Since it is more difficult to prove a restraint of trade meeting the stringent test of section 2, compared to that in section 1, section 2 is of relatively less importance in this context.

panies often bribe, however, to obtain individual sales or other contracts. Whether this constitutes an adequate restraint of trade is somewhat problematic. A line of mostly older cases rejected the notion.<sup>32</sup> But the reasoning generally underlying these cases—that commercial bribery is not one of the traditionally recognized Sherman Act violations—leaves much to be desired. The suggestion of rigid categories of viable Sherman Act claims ignores the adaptable nature of the Act.<sup>33</sup> The fundamental concern of section 1 is with contracts, combinations, and conspiracies which raise prices or inhibit free competition.<sup>34</sup> A conspiracy between a briber and

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32. See *Calnetics Corp. v. Volkswagen of America*, 532 F.2d 674, 687-88 (9th Cir.) (per curiam), cert. denied, 429 U.S. 940 (1976); *Parmelee Transp. Co. v. Keeshin*, 292 F.2d 794, 797-805 (7th Cir.), cert. denied, 368 U.S. 944 (1961); *Municipality of Anchorage v. Hitachi Cable, Ltd.*, 547 F. Supp. 633, 645 (D. Alaska 1982); *Sterling Nelson & Sons v. Rangen, Inc.*, 235 F. Supp. 393, 399-400 (D. Idaho 1964), aff'd on other grounds, 351 F.2d 851 (9th Cir. 1965), cert. denied, 383 U.S. 936 (1966); *Sears, Roebuck & Co. v. Blade*, 110 F. Supp. 96, 101 (S.D. Cal. 1953), appeal dismissed sub nom. *Sears, Roebuck & Co. v. Metropolitan Engravers, Ltd.*, 245 F.2d 67 (9th Cir. 1956). These cases, however, provide only limited authority. *Parmelee Transportation Co. v. Keeshin* did not involve the common type of commercial bribery, in which the briber pays the purchaser's agent to award a contract to it. Rather, the defendant bribed a government official who, in turn, offered favorable treatment to railroad companies in exchange for their award of an exclusive station transfer service contract to the defendant instead of the plaintiff. *Parmelee Transp. Co. v. Keeshin*, 292 F.2d at 796. Thus, the bribe did not undermine consumers' (here, the railroad companies') ability to obtain the advantages of free competition. It simply enabled the defendant to offer more, albeit illicit, consideration to those companies. Moreover, one recent opinion questioned the *Parmelee Transportation* court's reasoning. See *Corey v. Look*, 641 F.2d 32, 36 (1st Cir. 1981) (noting that the cases upon which *Parmelee Transportation* rested seemed inapposite to the facts before the *Parmelee Transportation* court). *Sterling Nelson & Sons v. Rangen, Inc.* involved a classic case of commercial bribery, but the plaintiff prevailed on the Robinson-Patman Act claim and chose not to appeal the district court's ruling on the Sherman Act. See *Rangen, Inc. v. Sterling Nelson & Sons*, 351 F.2d 851, 854 (9th Cir. 1965) (only defendants appealed the earlier ruling), cert. denied, 383 U.S. 936 (1966). In *Calnetics Corp. v. Volkswagen of America*, a typical case of commercial bribery, the United States Court of Appeals for the Ninth Circuit held that commercial bribery standing alone did not violate the Sherman Act. The court, however, left open the question of under which circumstances commercial bribery coupled with other conduct would constitute a violation of sections 1 and 2 of the Sherman Act. *Calnetics Corp. v. Volkswagen of America*, 532 F.2d at 687 & n.20. *Municipality of Anchorage v. Hitachi Cable, Ltd.* was bound by *Calnetics*. *Municipality of Anchorage v. Hitachi Cable, Ltd.*, 547 F. Supp. at 645. Finally, the opinion in *Sears, Roebuck & Co.* is unclear as to whether it found that the bribe created inadequate restraint to constitute a section 1 violation or created an insufficient effect on interstate commerce to provide jurisdiction. *Sears, Roebuck & Co. v. Blade*, 110 F. Supp. at 99-101.

33. See, e.g., *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978); *George R. Whitten, Jr., Inc. v. Paddock Pool Builders*, 508 F.2d 547 (1st Cir. 1974), cert. denied, 421 U.S. 1004 (1975).

34. See, e.g., *Standard Oil v. United States*, 221 U.S. 1, 58 (1911) (laying the groundwork for the Rule of Reason, used to gauge which agreements are permissible under the Sherman Act).



purchasing agent may raise prices and inhibit free competition just as effectively as a price-fixing combination among competitors.

Two more recent cases hold that bribery can violate the Sherman Act at least as long as the individual contracts obtained produce a significant market impact. In *Associated Radio Service Co. v. Page Airways*,<sup>35</sup> the plaintiff and defendant competed in the business of outfitting private aircraft with avionics. The plaintiff alleged that the defendant had violated sections 1 and 2 of the Sherman Act by engaging in a series of unfair business practices, including paying bribes to obtain both domestic and foreign contracts. In upholding a jury verdict for the plaintiff, the United States Court of Appeals for the Fifth Circuit concluded that the aggregate effect of the defendant's practices created a sufficient impact in the relevant market to violate both sections 1 and 2. Focusing specifically on the bribery, the court noted that the loss of even one contract due to a bribe produced a significant impact in this case since a company could stay in business with as few as two contracts per year.<sup>36</sup> *Associated Radio* cannot be dismissed on the grounds that the effect of bribery was unusually large due to an atypical industry. On the contrary, the market in *Associated Radio*, with a small number of companies competing for a few critical contracts,<sup>37</sup> typifies the situation where overseas bribery is most likely to occur.<sup>38</sup>

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35. *Associated Radio Serv. Co. v. Page Airways*, 624 F.2d 1342 (5th Cir. 1980), cert. denied, 450 U.S. 1030 (1981).

36. *Id.* at 1355.

37. *Id.* at 1346.

38. T. Gladwin & I. Walter, *Multinationals Under Fire: Lessons in the Management of Conflict* 313-14 (1980).

The court in *Associated Radio* approved a jury instruction which provides a definition of bribery for purposes of the Sherman Act:

Instruction Number 54: The plaintiffs contend that defendants furthered their anticompetitive scheme through the practice of "commercial bribery." There is a distinction to be made between commercial bribery of domestic corporations and citizens on the one hand and foreign officials on the other. I want to instruct you first with respect to the law on domestic commercial bribery.

"Commercial bribery" generally is a practice whereby one company obtains business by making secret payments to an employee of another company who in return steers business to the briber. Specifically, a commercial bribe is a secret payment made to an employee of one corporation for that employee's personal benefit by an employee of another corporation for the purpose of having the bribed employee use his influence to cause his corporation to favor the other corporation in preference to the other competitors.

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While *Associated Radio* involved allegations of a variety of unfair practices, the United States District Court for the Northern District of Georgia faced only allegations of bribery in *City of Atlanta v. Ashland-Warren, Inc.*<sup>39</sup> One of the defendants, Western Contracting ("Western"), asserted a counterclaim against the city and a cross-claim against another firm, F.O. Thacker Contracting ("Thacker"), which Western alleged had paid off city officials. Because of the payoff, these officials insisted that Western award a subcontract to Thacker for concrete work on a number of paving projects involved in the construction of a new terminal at the city's airport. When Western refused, preferring to do the concrete work itself, the officials awarded the paving contracts to a higher bidder who granted subcontracts to Thacker. In rejecting Thacker's motion to dismiss, the district court held that the allegations of a conspiracy which precluded competition for the concrete work could state a section 1 claim.<sup>40</sup> The court noted that the restraint of trade caused by the bribe was similar to that involved in reciprocal dealing or tying arrangements.<sup>41</sup> Such arrangements are *per se* violations of section 1 of the Sherman Act.<sup>42</sup>

An interesting question, for which these two decisions perhaps suggest conflicting answers, is whether bribery to obtain a sale or other contract constitutes a *per se* violation of section 1, thereby obviating any need to consider market impact. This question is beyond the scope of this Article. For purposes of this discussion, it is sufficient to note that many instances of foreign bribery will create enough market impact to constitute an illegal restraint of trade even under the less stringent Rule of Reason analysis.

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Instruction 57: Next, we come to the issue of foreign bribery. . . .

. . . .

A bribe . . . is a secret payment made to foreign government official for that official's personal use and for the purpose of having that official use his official influence to cause his government to choose the briber's product over that of a competitor.

*Associated Radio Serv. Co. v. Page Airways*, 624 F.2d at 1359-61 n.27. The jury instruction went on to quote the bribery laws of the countries whose officials the defendant bribed. *Id.* at 1361 n.27. The court instructed the jury that the payment must be illegal under the local laws before they could consider it the basis for a Sherman Act violation. *Id.* at 1360 n.27.

39. *City of Atlanta v. Ashland-Warren, Inc.*, 1982-1 Trade Cas. (CCH) ¶ 64,527 (N.D. Ga. 1981).

40. *Id.* at 72,924.

41. *Id.*

42. *Id.* (citing *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958)).

### B. *The Federal Trade Commission Act*

Section 5 of the Federal Trade Commission Act<sup>43</sup> ("FTC Act") declares unlawful unfair methods of competition and unfair or deceptive acts or practices.<sup>44</sup> This encompasses, but is not limited to, acts in violation of other antitrust laws.<sup>45</sup> Conduct is "unfair" if it offends public policy or causes substantial and unjustified injury to consumers or competitors.<sup>46</sup> Under this standard, bribery to gain sales or other competitive advantage is clearly unfair. Bribery does more than offend public policy; it is usually a crime.<sup>47</sup> Moreover, it harms consumers who are defrauded by the disloyalty of their agents and puts honest competitors at a disadvantage.

The Federal Trade Commission (FTC) has repeatedly attacked commercial bribery under section 5. In the FTC's early years, this was a major focus of its enforcement efforts.<sup>48</sup> The response of the courts was ambivalent. In one case, the United States Court of Appeals for the Second Circuit questioned whether commercial bribery creates sufficient impact on the public interest to violate section 5.<sup>49</sup> Another court, however, concluded without discussion that bribery falls within the statute's reach.<sup>50</sup> These decisions are rather old and precede both a liberalization in the judicial interpretation of section 5<sup>51</sup> and a 1938 amendment to the section.<sup>52</sup> Congress passed this amendment to undercut restrictive judicial interpretations of section 5 by expanding its reach from unfair methods of competition to also include unfair acts or practices.<sup>53</sup> As a result,

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43. Federal Trade Commission Act ("FTC Act") § 5, 15 U.S.C. § 45 (1982 & Supp. III 1985).

44. Section 5 of the FTC Act, as amended, states:

Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

15 U.S.C. § 45(a)(1) (1982).

45. See, e.g., *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 240 (1972).

46. *Id.*

47. See *supra* note 4.

48. See Note, *Bribery in Commercial Relationships*, 45 Harv. L. Rev. 1248, 1251 (1932).

49. See *New Jersey Asbestos Co. v. FTC*, 264 F. 509, 510 (2d Cir. 1920). The court concluded that the entertainment of employees involved in the proceeding did not constitute a fraud on their employers; *i.e.*, a bribe. Thus, its discussion of the applicability of section 5 to bribery is dictum.

50. See *T.C. Hurst & Son v. FTC*, 268 F. 874 (E.D. Va. 1920) (refusing to enjoin FTC prosecution of commercial briber).

51. See, e.g., *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972); *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966); *FTC v. R.F. Keppel & Bros.*, 291 U.S. 304 (1934).

52. Wheeler-Lea Amendment of 1938, ch. 49, § 3, 52 Stat. 111, 111.

53. See generally *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972) (finding that

even though no court has considered the issue for decades, a successful challenge to the FTC's long-standing position that commercial bribery violates section 5<sup>54</sup> seems unlikely.

One limitation, however, may curb the usefulness of the FTC Act against bribery. No private cause of action exists under the statute.<sup>55</sup> Thus, competitors defeated through bribes may receive no compensation. Also, prosecution of bribers depends upon the resources and priorities of the FTC. But, even though the FTC's activity in the area waned in the years following its early enforcement efforts, it never stopped.<sup>56</sup> More recently, the FTC issued orders against Lockheed, Boeing, and McDonnell Douglas for committing bribery overseas.<sup>57</sup>

### C. *The Robinson-Patman Act*

A third basis of liability for firms engaging in bribery is section 2(c) of the Robinson-Patman Act.<sup>58</sup> This section proscribes the payment of brokerage fees, commissions, and other compensation to agents in connection with the sale of goods except for services actually rendered.<sup>59</sup> Its principal purpose is to prevent the payment of false commissions and fees as a means of price discrimina-

the 1938 Wheeler-Lea Amendment to section 5 charged the FTC with protecting consumers as well as competitors).

54. See 16 C.F.R. § 13.315 (1986) (defining commercial bribery as an unfair trade practice).

55. *Holloway v. Bristol-Meyers Corp.*, 485 F.2d 986 (D.C. Cir. 1973); *Carlson v. Coca-Cola Co.*, 483 F.2d 279 (9th Cir. 1973); cf. *Guernsey v. Rich Plan of the Midwest*, 408 F. Supp. 582, 586-89 (N.D. Ind. 1976) (distinguishing *Holloway v. Bristol-Meyers Corp.* on its facts and holding that a private cause of action may exist under section 5, where the FTC has previously examined the complained of practices at issue in another district and found them so wanting as to require issuance of a cease and desist order).

56. See, e.g., *In re National Grain Yeast Corp.*, 33 F.T.C. 684 (1941).

57. *In re McDonnell Douglas Corp.*, 92 F.T.C. 976 (1978); *In re Boeing Co.*, 92 F.T.C. 972 (1978); *In re Lockheed Corp.*, 92 F.T.C. 968 (1978).

58. Robinson-Patman Act § 2(c), 15 U.S.C. § 13(c) (1982).

59. Section 2(c) of the Robinson-Patman Act, as amended, provides:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to the agent, representative, or other intermediary therein where such intermediary is acting in fact for or in the behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

15 U.S.C. § 13(c) (1982).

tion.<sup>60</sup> In addition, courts have repeatedly held that it prohibits a bribe made for the purpose of procuring a sales contract.<sup>61</sup>

This interpretation of section 2(c) originated in *Fitch v. Kentucky-Tennessee Light & Power Co.*<sup>62</sup> The United States Court of Appeals for the Sixth Circuit ruled that a coal company violated section 2(c) when one of its employees paid the president of the plaintiff power company to purchase coal from it.<sup>63</sup> Two decades later, the United States Court of Appeals for the Ninth Circuit followed *Fitch* in a suit brought by a disappointed competitor. In *Rangen, Inc. v. Sterling Nelson & Sons*,<sup>64</sup> the defendant had obtained contracts for the sale of fish feed to the State of Idaho Department of Fisheries by bribing a state official.<sup>65</sup> The Ninth Circuit held that this conduct violated section 2(c) of the Robinson-Patman Act and allowed the plaintiff to collect treble damages measured by the amount the plaintiff would have earned had it obtained sales with the state in proportion to the share of contracts awarded to it after the bribery ceased.<sup>66</sup>

*Fitch* and *Rangen* have been criticized on various grounds. Admittedly, the prohibition of bribery is not immediately apparent on the face of the statute. But, these cases reflect the view that the

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60. *FTC v. Henry Broch & Co.*, 363 U.S. 166, 168 (1960).

61. See *infra* notes 62-75 and accompanying text.

62. *Fitch v. Kentucky-Tennessee Light & Power Co.*, 136 F.2d 12 (6th Cir. 1943).

63. *Id.* at 16. While *Fitch* allowed recovery by the defrauded principal, later decisions disagree over whether this party, as opposed to a competitor defeated through bribery, has standing under section 4 of the Clayton Act, 15 U.S.C. § 15 (1982). Compare *Bunker Ramo Corp. v. Cywan*, 511 F. Supp. 531 (N.D. Ill. 1981) (holding that where an agent for the principal corporation took bribes from the defendant supplier to insure a sales contract with the principal, there was no cognizable injury to the plaintiff principal under the Robinson-Patman Act, since the Act would only apply to the suppliers' competitors who were injured by the bribe) and *Computer Statistics, Inc. v. Blair*, 418 F. Supp. 1339 (S.D. Tex. 1976) (holding that some anticompetitive effect on the plaintiff is necessary to establish a cause of action under commercial bribery provisions of the Robinson-Patman Act, and a plaintiff who cannot show such injury lacks standing to complain about bribes) with *Municipality of Anchorage v. Hitachi Cable, Ltd.*, 547 F. Supp. 633 (D. Alaska 1982) (holding that competitive injury to the plaintiff is not required to maintain an action under the Robinson-Patman Act).

64. *Rangen, Inc. v. Sterling Nelson & Sons*, 351 F.2d 851 (9th Cir. 1965), cert. denied, 383 U.S. 936 (1966).

65. *Id.* at 854-55.

66. *Id.*, aff'g 235 F. Supp. 393 (D. Idaho 1964). *Rangen* illustrates one creative way to deal with the issue of showing that but for the bribe the plaintiff would have obtained the sale. However, in *Computer Statistics, Inc. v. Blair*, 418 F. Supp. 1339 (S.D. Tex. 1976), the court went one step further by foregoing proof of what the plaintiff would have obtained but for the bribe. Instead, the court awarded damages measured by the defendant's profits. *Id.* at 1349.



bribe is "compensation" to an "agent" which is not "for services rendered in connection with the sale." Of course, this ignores the services the agent performed for the briber—a result that the court in *Rangen* argued is compelled by legislative history.<sup>67</sup> Even if the language of section 2(c) can reasonably be read to encompass bribery, numerous commentators have argued that bribery has little to do with the general goals of the antitrust laws and the specific anti-price discrimination objective of the Robinson-Patman Act.<sup>68</sup> The former argument, however, ignores the anticompetitive impact of bribery<sup>69</sup> and both *Fitch* and *Rangen* reject the latter contention. Nothing in the language of section 2(c) indicates that the existence of price discrimination is a precondition for application.<sup>70</sup>

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67. *Rangen, Inc. v. Sterling Nelson & Sons*, 351 F.2d at 856-57. Earlier cases held that section 2(c) prohibits the payment by the seller for services rendered by an agent of the buying party, and that it is immaterial whether the services rendered to the seller were legitimate, since the agent cannot serve two masters. See *Modern Mktg. Serv. v. FTC*, 149 F.2d 970 (7th Cir. 1945); *Great Atl. & Pac. Tea Co. v. FTC*, 106 F.2d 667 (3d Cir.), cert. denied, 308 U.S. 625 (1939). The *Rangen* court declined to rely on these cases, but simply concluded that the "services rendered" exception of section 2(c) may not reach disloyal conduct. See also *Grace v. E.J. Kozin Co.*, 538 F.2d 170 (7th Cir. 1976) (holding that section 2(c) may apply where an agent attempts to serve two masters).

*Fitch* and *Rangen* gave cursory treatment to another argument concerning the language of section 2(c). The defendants asserted that the very disloyalty of accepting a bribe meant that the recipient could not be considered an agent, at least for purposes of the transaction at issue. This argument finds no support in agency law. See *Restatement (Second) of Agency* § 391 (1958). It is also inconsistent with references in the section's legislative history to bribed agents. See, e.g., 80 Cong. Rec. 7759-60 (1936) (remarks of Rep. Patman).

*Rangen* went one step further in its interpretation of who is an "agent, representative, or other intermediary" for purposes of section 2(c). The bribed official was not directly responsible for selecting suppliers of fish feed; nevertheless, he used his influence upon those who were. The court held that this was enough. This holding is of great significance in the foreign bribery context where payments often involve buying influence. Lockheed's payment to Japanese politicians for promoting the sale of its planes provides one example. See *In re Lockheed Corp.*, 92 F.T.C. 968 (1978).

68. See, e.g., 2 R. Callman, *The Law of Unfair Competition Trademarks and Monopolies* § 12.01 (L. Altman 4th ed. 1982); Rill & Frank, *supra* note 3, at 144-49; Zamansky, *Preferential Treatment, Payoffs and the Antitrust Laws: Distortion of the Competitive Process Through Commercial Bribery*, 83 Com. L.J. 558, 561-66 (1978); Recent Case, 79 Harv. L. Rev. 1531, 1533-34 (1966).

69. The court in *Fitch* aptly noted:

Plainly, the payment of the secret commissions to Fitch . . . resulted in lessening competition in the sale of coal to the Power Company. It would have been practically impossible for any other company to sell coal to appellee, when the president of the Power Company had such an understanding with the Coal Company and such a motive to purchase from it all the coal requirements for his company.

*Fitch v. Kentucky-Tennessee Light & Power Co.*, 136 F.2d 12, 16 (6th Cir. 1943).

70. Prior to the Supreme Court's decision in *FTC v. Henry Broch & Co.*, 363 U.S. 166

Moreover, passages in the legislative history suggest that Congress, when enacting the provision, was indeed concerned with agents who receive bribes.<sup>71</sup>

In any event, these arguments are probably moot as a growing number of United States courts of appeals follow the Sixth and Ninth Circuits in viewing section 2(c) as prohibiting bribery in the sale of goods.<sup>72</sup> While the Supreme Court has never ruled on the

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(1960), courts agreed that section 2(c) did not require any finding of price discrimination. See *Southgate Brokerage Co. v. FTC*, 150 F.2d 607, 609 (4th Cir.), cert. denied, 326 U.S. 774 (1945); *Great Atl. & Pac. Tea Co. v. FTC*, 106 F.2d 667 (3d Cir.), cert. denied, 308 U.S. 625 (1939). *Henry Broch & Co.* introduced uncertainty on this question with its references to discriminatory price reductions unjustified by cost savings. *FTC v. Henry Broch & Co.*, 363 U.S. at 173; see also *Ideal Plumbing Co. v. Benco, Inc.*, 529 F.2d 972, 976 n.3 (8th Cir. 1976) (noting that the Supreme Court's decision in *Henry Broch & Co.* unsettled the interpretation of section 2(c) by emphasizing that discrimination is in fact an element of the statutory proscription). The court in *Rangen*, however, noted that *Henry Broch & Co.* only looked to the existence of discrimination to determine if the seller's broker reduced its commission in lieu of granting brokerage to the buyer. *Rangen, Inc. v. Sterling Nelson & Sons*, 351 F.2d at 858. Thus, discrimination remains irrelevant to outright payments.

71. A practice has grown up whereby large mass buyers bribe representatives of the seller . . . under the guise of a brokerage allowance. It is not a brokerage allowance at all; it is a bribe. [Section 2(c)] will not compel the use of a broker but it will prohibit one party from bribing the representative of the other under the guise of brokerage allowances or commissions.

80 Cong. Rec. 7759-60 (remarks of Rep. Patman). See H.R. Rep. No. 2287, 74th Cong., 2d Sess. 14 (1936). But see Recent Case, *supra* note 68, at 1533-34 (arguing that legislative history passages quoted by *Rangen* are taken out of context and do not show concern for commercial bribery).

72. See, e.g., *Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft*, 716 F.2d 245 (4th Cir. 1983); *Grace v. E.J. Kozin Co.*, 538 F.2d 170, 173 (7th Cir. 1976) (also finding that the bribe had a discriminatory effect); *Ideal Plumbing Co. v. Benco, Inc.*, 529 F.2d 972, 977-78 (8th Cir. 1976) (dicta); *Jones v. Borden Co.*, 430 F.2d 568, 571-72 (5th Cir. 1970) (dicta). But see *Excel Handbag Co. v. Edison Bros. Stores*, 630 F.2d 379, 386-87 (5th Cir. 1980) (refused to reach question of whether commercial bribery violates section 2(c)). The Ninth Circuit continues to adhere to its decision in *Rangen*. See *May Dep't Store v. Graphic Process Co.*, 637 F.2d 1211, 1214-15 (9th Cir. 1980); *Calnetics Corp. v. Volkswagen of America*, 532 F.2d 674, 696 (9th Cir.) (per curiam), cert. denied, 429 U.S. 940 (1976). In addition, a number of United States district courts applied section 2(c) against commercial bribery. See *Municipality of Anchorage v. Hitachi Cable, Ltd.*, 547 F. Supp. 633, 637-41, 644 (D. Alaska 1982); *Bunker Ramo Corp. v. Cywan*, 511 F. Supp. 531, 533 (N.D. Ill. 1981); *Computer Statistics, Inc. v. Blair*, 418 F. Supp. 1339, 1347 (S.D. Tex. 1976); *Stutzman Feed Serv. v. Todd & Sargent, Inc.*, 336 F. Supp. 417, 419 (S.D. Iowa 1972); *Canadian Ingersoll-Rand Co. v. D. Loveman & Sons*, 227 F. Supp. 829, 833 (N.D. Ohio 1964); *Fuchs Sugars & Syrups, Inc. v. Amstar Corp.*, 447 F. Supp. 867, 882-83 (S.D.N.Y. 1978) (dicta), rev'd on other grounds, 602 F.2d 1025 (2d Cir.), cert. denied, 444 U.S. 917 (1979); cf. *Rodman v. Haines*, 1976-2 Trade Cas. (CCH) ¶ 61,074, at 69,841-42 (S.D.N.Y. 1976) (section 2(c) inapplicable to commercial bribery not in context of sale of goods) (distinguishing *Fitch*, *Rangen*, and *Canadian Ingersoll-Rand*). But cf. *Kasper Wire Works v. Leco Eng'g & Mach.*, 190 U.S.P.Q. (BNA) 85, 90 (M.D. Fla. 1976) ("The Robinson-Patman Act is aimed at price discrimination, not conspiracy . . .") (citation omitted), aff'd on other grounds, 575 F.2d 530 (5th Cir. 1978).

issue, it has twice indicated its concurrence in dicta.<sup>73</sup> Furthermore, given the arguably detrimental impact of the Robinson-Patman Act in general, and section 2(c) in particular,<sup>74</sup> using the section to combat bribery may be its most beneficial application. Such application of section 2(c) to bribes, however, suffers from one limitation. It only reaches payments made in connection with a sale of goods. Bribes made to obtain service contracts or leases are not covered.<sup>75</sup>

### III. EXTRATERRITORIAL APPLICATION AGAINST FOREIGN COMPANIES

#### A. *Theoretical Foundation*

Given that bribery often violates the antitrust laws, can these laws apply when the bribe occurs overseas and the briber is an agent or employee of a foreign company? First, it is necessary to obtain personal jurisdiction over a nonresident defendant.<sup>76</sup> The problems associated with obtaining personal jurisdiction over a nonresident defendant have been explored elsewhere<sup>77</sup> and hence will not be developed here. It should suffice to note that a suit involving bribery raises no problems of personal jurisdiction different from any other litigation with foreign entities involving conduct occurring overseas. As a practical matter, the minimum contacts requirement<sup>78</sup> probably limits the class of prospective

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73. See *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972); *FTC v. Henry Broch & Co.*, 363 U.S. 166, 174 (1960).

74. See, e.g., Report of the White House Task Force on Antitrust Policy ("Neal Report"), ch. 4, at 1-10 (1968), reprinted in 1 J. Reprints for Antitrust L. & Econ. 631, 687-96 (1969).

75. *May Dep't Store v. Graphic Process Co.*, 637 F.2d 1211, 1214 (9th Cir. 1980); *Freeman v. Chicago Title & Trust Co.*, 505 F.2d 527, 529 (7th Cir. 1974); *Rodman v. Haines*, 1976-2 Trade Cas. (CCH) ¶ 61,074, at 69,841-42 (S.D.N.Y. 1976); *Stutzman Feed Serv. v. Todd & Sargeant, Inc.*, 336 F. Supp. 417, 419 (S.D. Iowa 1972).

76. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) (requiring "minimum contacts" for jurisdiction); see also *United States v. Scophony Corp. of America*, 333 U.S. 795 (1948) (case involving a foreign firm conducting its business in the United States through subsidiaries).

77. See, e.g., *Friedman & Wilson, Representing Foreign Clients in Civil Discovery and Grand Jury Proceedings*, 26 Va. J. Int'l L. 327, 335-41 (1986).

78. *Friedman and Wilson* indicate that

[e]ven fairly minimal contacts with the forum country suffice to establish "specific jurisdiction" where the contact itself gives rise to the cause of action. Specific jurisdiction has its limits, however, and when the relationship between the foreign party's contacts with the forum state and the facts surrounding the cause



defendants to the larger foreign multinational firms which do business in the United States as well as abroad.<sup>79</sup>

Personal jurisdiction, however, is not a sufficient basis upon which to apply U.S. law. Legislative (or proscriptive) jurisdiction must also exist.<sup>80</sup> In its simplest terms, this means that Congress intended the legislation to apply to the overseas transaction and that the United States Constitution imposes no barrier to carrying out this intent.<sup>81</sup> When the intent of Congress is unstated, as it often is, courts must turn to general principles of proscriptive jurisdiction which are widely accepted in United States jurisprudence<sup>82</sup> and customary international law.<sup>83</sup>

Five principles govern a nation's power to apply its own law to any conduct: universality, the protective principle, nationality, passive personality, and territoriality.<sup>84</sup> Three of these clearly do not apply to overseas bribery by foreign competitors. Although bribery

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of action become sufficiently attenuated, a court lacks jurisdiction. "General jurisdiction," which is based on the overall presence of a party within the forum and not on contacts related specifically to the cause of action, demands a far higher level of minimum contacts. To assert general jurisdiction, it must be shown that the foreign party has business contacts with the forum that are "continuous and systematic." Unless it is possible to show contacts between a foreign party and the forum necessary to maintain specific or general jurisdiction, due process prohibits the exercise of jurisdiction by a domestic court.

*Id.* at 335-36 (footnotes omitted).

79. An interesting question is whether the effect on the U.S. company losing business due to bribery would be sufficient in itself to create personal jurisdiction over the foreign briber. Some authority suggests that causing a foreseeable effect within the United States may provide an adequate basis for personal jurisdiction. See Restatement (Second) of Conflict of Laws § 37 (1971); *Quattrone v. Superior Court*, 44 Cal. App. 3d 296, 303-06, 118 Cal. Rptr. 548, 552-54 (1975); see also *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972) (discussing various bases for the exercise of personal jurisdiction). More recent decisions by the Supreme Court, however, indicate that due process requires more. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Kulko v. Superior Court*, 436 U.S. 84 (1978).

80. Restatement of Foreign Relations Law of the United States (Revised) § 401 (Tent. Draft No. 6, 1985) [hereinafter Restatement, Tent. Draft No. 6].

81. See, e.g., *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1339 (2d Cir. 1972); *United States v. Aluminum Co. of America*, 148 F.2d 416, 443-44 (2d Cir. 1945).

82. Restatement (Second) of Foreign Relations Law of the United States §§ 17-18 (1965); Restatement, Tent. Draft No. 6, *supra* note 80, §§ 402-404.

83. See I. Brownlie, *Principles of Public International Law* 299-305 (3d ed. 1979); see also *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 117-18 (1804) ("[A]n act of congress ought never to be construed to violate the law of nations . . .").

84. See, e.g., *Rivard v. United States*, 375 F.2d 882, 885 (5th Cir. 1967), cert. denied, 389 U.S. 884 (1967); Harvard Research on International Law: Jurisdiction With Respect to Crime, 29 Am. J. Int'l L. Supp. 435, 445 (1935); Restatement, Tent. Draft No. 6, *supra* note 80, §§ 402-404; Blakesley, *supra* note 17, at 686-719.

is universally condemned, it is not a crime, such as piracy or genocide, which is so heinous as to allow for universal jurisdiction.<sup>85</sup> Nor do overseas bribes made by foreign firms come within the protective principle because they do not threaten the security of the United States government.<sup>86</sup> The nationality principle obviously does not apply when the bribe is made by a foreign company.<sup>87</sup> Passive personality (jurisdiction based upon the nationality of the victim), however, would seem to apply when the bribe harms a defeated U.S. competitor.<sup>88</sup> But, the United States does not recognize the passive personality principle.<sup>89</sup> The only remaining basis for the exercise of jurisdiction is the territorial principle.<sup>90</sup> This principle encompasses conduct both within the United States (subjective territoriality)<sup>91</sup> and without the United States when the conduct causes undesirable effects within the country (so-called objective territoriality).<sup>92</sup> This latter form of the territorial principle may well apply to foreign bribery.

The Permanent Court of International Justice held that objective territoriality, or the effects test, is consistent with international law in the *Case of the S.S. Lotus*.<sup>93</sup> Many nations,<sup>94</sup> includ-

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85. See Restatement, Tent. Draft No. 6, *supra* note 80, § 404.

86. *Id.* § 402(3) & comment f.

87. See *id.* § 402(2).

88. The passive personality theory allows a state, in certain circumstances, to apply its law to an act committed outside its territory by a person who is not its national, on the basis that the victim of the act was its national. See generally *id.* § 402 comment g (defining the "passive personality principle").

89. J. Brierly, *Law of Nations* 302 (1955); Restatement (Second) of Foreign Relations Law of the United States § 30(2) comment e; Blakesley, *supra* note 17, at 715; see also U.S. Dep't of State, Report on Extraterritorial Crime and Cutting's Case, U.S. Foreign Relations 751, 757 (1887), reported in 2 J.B. Moore, *International Law Digest* 232-40 (1906). Cutting's Case involved the Mexican government's imprisonment of a U.S. citizen for publishing an article in a U.S. newspaper which supposedly slandered a Mexican national. The United States rejected the Mexican government's jurisdictional claim which was based upon the passive personality principle. See *id.*

90. Restatement, Tent. Draft No. 6, *supra* note 80, § 402 comment c.

91. *Id.* § 402(1)(a)-(b).

92. *Id.* § 402(1)(c).

93. *Case of the S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7); see generally Hudson, *The Sixth Year of the Permanent Court of International Justice*, 22 *Am. J. Int'l L.* 1, 8 (1928) (discussion of *S.S. Lotus*). This adjudication arose when France protested the prosecution by Turkey of a French national who negligently allowed his vessel to collide with a Turkish ship, killing several of its crew. Even though the negligent conduct occurred aboard a French vessel in international waters, it created effects aboard the Turkish ship, which the court considered to be Turkish territory.

94. See Restatement (Second) of Foreign Relations Law of the United States § 18 reporter's note 4 (1965) (citing *The King v. Oliphant*, [1905] 2 K.B. 67; Judgment of July 2,

ing the United States,<sup>95</sup> regularly employ this principle. Some countries have criticized the United States for using this principle to extend the reach of regulatory statutes, particularly the anti-trust laws,<sup>96</sup> to overseas conduct based upon economic rather than physical effects.<sup>97</sup> The United States is not alone, however, in asserting proscriptive jurisdiction based upon economic effects.<sup>98</sup> Moreover, a review of protests against extraterritorial antitrust jurisdiction<sup>99</sup> found that they really reflected political and philosophical differences with the substantive regulation as applied in certain cases rather than an objection to the underlying jurisdictional principle.<sup>100</sup>

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1932 (Milleli, gérant de *la Tribuna*, et Davanzati v. Turati), Cour de Cassation (ch. crim.), Fr., [1932] 2 Gazette du Palais 532; Judgment of Feb. 27, 1906 (In re Bistagne), Cour de Cassation pénale de Vaud, Switz., 1906 Journal des Tribunaux, Cantonal 267); infra note 98.

95. See, e.g., *Strassheim v. Daily*, 221 U.S. 280, 285 (1911); *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206 (2d Cir.), rev'd on other grounds, 405 F.2d 215 (2d Cir. 1968) (en banc), cert. denied, 395 U.S. 906 (1969).

96. See Restatement, Tent. Draft No. 6, supra note 80, § 415 (jurisdiction to apply anti-trust laws); see also Restatement of Foreign Relations Law of the United States (Revised) § 416 (Tent. Draft No. 7, 1986) (securities laws).

97. See, e.g., Letter from the British Embassy in Washington to the United States Government (Nov. 27, 1979), reprinted in A.V. Lowe, *Extraterritorial Jurisdiction* 183 (1983); see generally Restatement, Tent. Draft No. 6, supra note 80, § 402 reporter's note 2 ("effects doctrine" and economic regulation).

98. See, e.g., *Kartellgesetz* § 4, 1972 Bundesgesetzblatt No. 460 (Aus.) (Cartel Act); *Combines Investigation Act*, R.S.C. ch. C-23, § 32(5) (1970); *Gesetz gegen Wettbewerbsbeschränkungen* § 98(2), 1957 Bundesgesetzblatt I 1081, 1099 (as amended) (W. Ger.) (Act Against Restraints on Competition); *Imperial Chem. Indus. v. Commission des Communautés européennes* (Dyestuffs Case), 18 Recueil 619, 665-66, [1971-1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8161, at 8030-31 (1972); *Béguelin Import Co. v. G.L. Import Export S.A.*, 17 Recueil 949, 959-60, [1971-1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8149, at 7704 (1972); see generally Restatement, Tent. Draft No. 6, supra note 80, § 415 reporter's note 9 (convergence of U.S. and foreign antitrust laws); OECD Report of the Committee of Experts on Restrictive Business Practices, *Restrictive Business Practices of Multinational Enterprises* ¶ 120, at 37 (1977) ("[T]he criterion of effects is embodied in the legislation of Germany, Austria, Denmark, Spain, France, Sweden, and Finland; it has moreover been recognized in the case law of Canada, Japan, Switzerland, the United States and the European Communities and attested by doctrine in Belgium.").

99. See Meessen, *Antitrust Jurisdiction Under Customary International Law*, 78 Am. J. Int'l L. 783 (1984).

100. For example, the leading U.S. antitrust case applying the effects test, *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), was rather favorably received abroad at the time of its decision, whereas many of the cases eliciting protests, such as *Laker Airways v. Sabena*, *Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984); *In re Uranium Antitrust Litig.*, 617 F.2d 1248 (7th Cir. 1980); and *United States v. Watchmakers of Switzerland Information Center*, 1963 Trade Cas. (CCH) ¶ 70,600 (S.D.N.Y. 1962), order modified, 1965 Trade Cas. (CCH) ¶ 71,352 (S.D.N.Y. 1965), involved conduct occurring at least in part in the United States.

Interestingly, one of the leading cases recognizing the effects principle in the United States involved the crime of bribery. In *Strassheim v. Daily*,<sup>101</sup> the defendant bribed a Michigan prison warden to accept inferior goods in fulfillment of a contract with the state. Although the defendant made the offer to the warden in Chicago, the United States Supreme Court held that Michigan could prosecute under its criminal law since the effect occurred in Michigan.<sup>102</sup> Bribery's effect, however, is not limited to the loss suffered by the defrauded principal—in *Strassheim*, the Michigan prison system. It also extends to the loss suffered by any competitors defeated through the use of a bribe. Therefore, if the effect on a defrauded principal within a state is enough to give the state jurisdiction to proscribe, the effect on a defeated competitor within a state should be sufficient as well.

### B. *The Sherman Act*

Section 1 of the Sherman Act prohibits restraints of trade or commerce among the states or "with foreign nations."<sup>103</sup> The seminal decision in *United States v. Aluminum Co. of America* ("Alcoa")<sup>104</sup> established the broad jurisdictional reach of this prohibition. The government, in addition to its primary action against the Aluminum Co. of America ("Alcoa") for monopolizing the domestic aluminum industry, brought an action against a Canadian company, Aluminum Ltd., which had entered into an agreement setting production quotas with other foreign producers of alumi-

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101. *Strassheim v. Daily*, 221 U.S. 280 (1911).

102. *Id.* at 284-85. Some of the defendant's conduct occurred in Michigan, but the Court does not appear to treat this fact as critical. Later cases interpret *Strassheim* as not limited in its holding by this fact. See, e.g., *United States v. Brown*, 549 F.2d 954, 956 (4th Cir.), cert. denied, 430 U.S. 949 (1977); *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206 (2d Cir.), rev'd on other grounds, 405 F.2d 215 (2d Cir. 1968) (en banc), cert. denied, 395 U.S. 906 (1969); *United States v. Aluminum Co. of America*, 148 F.2d 416, 443 (2d Cir. 1945). But see *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1161, 1182 n.45 (E.D. Pa. 1980) (distinguishing *Strassheim* as an interstate rather than an international effect case and as involving some activity of the defendant in the prosecuting state).

103. 15 U.S.C. § 1 (1982).

104. *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) (L. Hand, J.). The United States Court of Appeals for the Second Circuit heard this appeal acting as a special statutory court since a quorum of the United States Supreme Court could not be obtained. *Id.* at 421. As a result, the precedential weight of this decision is greater than simply that of a United States court of appeals opinion. *American Tobacco Co. v. United States*, 328 U.S. 781, 811 (1946).



num.<sup>105</sup> The court held that the Sherman Act applied to this agreement, even though foreign companies made and performed the agreement abroad, as long as it was intended to and did affect U.S. imports or exports.<sup>106</sup> While the production quotas in *Alcoa* presumably affected imports, numerous courts have since held that restraints impeding opportunities for U.S. exporters also fall within the reach of the Sherman Act.<sup>107</sup> Thus, loss of exports for U.S. firms due to bribery appears to provide a basis for enforcement of the Sherman Act.<sup>108</sup>

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105. The government challenged whether Aluminum Ltd. was independent of Alcoa. The district court found the two companies to be independent, however, and the court of appeals accepted this finding. *United States v. Aluminum Co. of America*, 148 F.2d at 440-41.

106. *Id.* at 444. The fact that the production quotas took into account Aluminum Ltd.'s sales into the United States established the intent to affect U.S. imports. While the record contained no evidence of actual effect, the court presumed such based upon the showing of intent. *Id.* at 444-45.

107. See, e.g., *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 132 (1969) (patent pool impeded exports of U.S. televisions to Canada); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704 (1962) (preclusion of U.S. exporter from selling vanadium to Canada); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1291-92 (3d Cir. 1979) (fraudulently secured foreign patents prevented U.S. company's exports of vinyl floor covering); *Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196, 1202 (9th Cir. 1975) (restricted supply of oranges available to U.S. exporter of oranges to Hong Kong), cert. denied, 425 U.S. 959 (1976); *United States v. C. Itoh & Co.*, 1982-83 Trade Cas. (CCH) ¶ 65,010, at 70,607 (W.D. Wash. 1982) (consent decree against buyer's cartel activities by Japanese importers of processed seafood from Alaska); *Daishowa Int'l v. North Coast Export Co.*, 1982-2 Trade Cas. (CCH) ¶ 64,774, at 71,788-90 (N.D. Cal. 1982) (buyers' cartel activities by Japanese importers of wood chips from the United States); *Waldbaum v. Worldvision Enterprises, Inc.*, 1978-2 Trade Cas. (CCH) ¶ 62,378, at 76,258 (S.D.N.Y. 1978) (block booking by U.S. motion picture film supplier foreclosed other U.S. film exporters from South African market); *Industria Siciliana Asfalti, Bitumi, S.p.A. v. Exxon Research & Eng'g Co.*, 1977-1 Trade Cas. (CCH) ¶ 61,256, at 70,783 (S.D.N.Y. 1977) (reciprocal dealing agreement foreclosed opportunity for competing U.S. refinery engineering firms to export services to Italian company); *Sulmeyer v. Seven-Up Co.*, 411 F. Supp. 635, 639 (S.D.N.Y. 1976) (exclusive franchise agreements precluded access to foreign markets by competing U.S. soft drink company); *United States v. Learner Co.*, 215 F. Supp. 603, 605-07 (D. Hawaii 1963) (competing U.S. dealers in scrap metal foreclosed from exporting to Japan); *United States v. Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947, 961 (D. Mass. 1950) (effect of overseas joint venture activities was to preclude exports by competing U.S. manufacturers of coated abrasives), decree amended, 96 F. Supp. 356 (D. Mass. 1951).

108. Bribery might also be used to gain exclusive access to natural resources or to impede a competitor's ability to conduct other business operations. See *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404, 405 (9th Cir. 1983) (per curiam), cert. denied, 464 U.S. 1040 (1984). Obtaining exclusive access to resources will often affect U.S. imports. In this event, the Sherman Act can apply. *United States v. Sisal Sales Corp.*, 274 U.S. 268, 274-75 (1927) (access to Mexican sisal); *Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 671 F.2d 876, 883 (5th Cir. 1982) (access to Indonesian lumber), vacated, 460 U.S. 1007, reaff'd per curiam on remand, 704 F.2d 785 (5th Cir.), cert. denied, 464 U.S. 961 (1983); *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 615 (9th Cir. 1976) (access to Honduran lumber);

Before concluding that the Sherman Act will apply, however, three questions must be answered. The first is whether the Sherman Act can apply to conduct undertaken exclusively by foreign parties and occurring exclusively abroad. Most of the decisions applying the Sherman Act against companies impeding U.S. exports involved U.S. defendants.<sup>109</sup> In addition, many of these decisions involved at least some activity by the defendants in the United States.<sup>110</sup> Nevertheless, *Alcoa* held that the Sherman Act does reach conduct committed exclusively abroad and solely by foreign companies and the opinion did not distinguish between an effect on imports or exports in reaching this conclusion.<sup>111</sup> Similarly, in *Daishowa International v. North Coast Export Co.*,<sup>112</sup> a decision involving buyers' cartel activities by Japanese importers, the United States District Court for the Northern District of California applied the Sherman Act even though the principal defendant

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*Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92, 102-03 (C.D. Cal. 1971) (access to offshore oil from a Persian Gulf nation), *aff'd per curiam* on other grounds, 461 F.2d 1261 (9th Cir.), cert. denied, 409 U.S. 950 (1972). Impeding other business opportunities for U.S. firms might also affect imports or exports. If not, the Sherman Act will not apply.

109. See, e.g., *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 104 (1969); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 690 (1962); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1292 (3d Cir. 1979); *Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196, 1201 (9th Cir. 1975), cert. denied, 425 U.S. 959 (1976); *Waldbaum v. Worldvision Enterprises, Inc.*, 1978-2 Trade Cas. (CCH) ¶ 62,378, at 76,255 (S.D.N.Y. 1978); *Industria Siciliana Asfalti, Bitumi, S.p.A. v. Exxon Research & Eng'g Co.*, 1977-1 Trade Cas. (CCH) ¶ 61,256, at 70,776 (S.D.N.Y. 1977); *Sulmeyer v. Seven-Up Co.*, 411 F. Supp. 635, 639 (S.D.N.Y. 1976); *United States v. Learner Co.*, 215 F. Supp. 603, 605 (D. Hawaii 1963); *United States v. Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947, 951 (D. Mass. 1950), decree amended, 96 F. Supp. 356 (D. Mass. 1951).

110. See, e.g., *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 706 (1962) ("As in *Sisal*, the conspiracy was laid in the United States, was effectuated both here and abroad . . ."); *Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196, 1201 (9th Cir. 1975), cert. denied, 425 U.S. 959 (1976); *Sulmeyer v. Seven-Up Co.*, 411 F. Supp. 635, 639 (S.D.N.Y. 1976) ("The challenged conduct includes actions taken with [sic] the United States."); *United States v. Learner Co.*, 215 F. Supp. 603, 605 (D. Hawaii 1963); *United States v. Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947, 951 (D. Mass. 1950), decree amended, 96 F. Supp. 356 (D. Mass. 1951).

111. *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945); see also *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1161, 1186-87 (E.D. Pa. 1980) (rejecting the argument that the Sherman Act could not reach a foreign company which acted solely outside the United States); cf. *Fleischmann Distilling Corp. v. Distillers Co.*, 395 F. Supp. 221, 226-27 (S.D.N.Y. 1975) (Sherman Act applied against British distillers who included termination provisions in distributorship agreements with U.S. distributors of Scotch whiskey sold F.O.B. England).

112. *Daishowa Int'l v. North Coast Export Co.*, 1982-2 Trade Cas. (CCH) ¶ 64,774 (N.D. Cal. 1982).

was a Japanese company. The court was also apparently unconcerned with the location of the illegal conduct.<sup>113</sup>

The second question is whether bribery can cause a sufficient effect, both in nature and magnitude, on exports to meet the standards enunciated by the courts and recently written into the Sherman Act by Congress.<sup>114</sup> *Alcoa* required both an effect on imports or exports and an intent to cause the effect.<sup>115</sup> Subsequent cases show variations in the magnitude of effect required,<sup>116</sup> the degree of intent which must exist,<sup>117</sup> and whether the test is conjunctive or disjunctive.<sup>118</sup> In 1982, as part of the Export Trading Company Act,<sup>119</sup> Congress amended the Sherman Act to clarify the standard.<sup>120</sup> The amendment requires that any effect be on stateside U.S. exporters rather than on offshore companies even if U.S.-owned.<sup>121</sup> The amendment further specifies that the effect must be

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113. This case began as a breach of contract action by a Japanese paper company against a U.S. export trade association who agreed to supply wood chips. The trade association counterclaimed, alleging that the Japanese purchasers of wood chips conspired to divide suppliers they would buy from, fix prices they would pay, and boycott any objecting sellers. The district court rejected the motion to dismiss for lack of subject matter jurisdiction. *Id.* at 77,786. The parties disputed the location of the Japanese company's conduct, but the court seemingly ignored this factor in deciding to apply U.S. law. While *Daishowa International* involved foreign buyers rather than competitors, this should not make any difference. For a similar case, see *United States v. C. Itoh & Co.*, 1982-83 Trade Cas. (CCH) ¶ 65,010 (W.D. Wash. 1982).

114. Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, tit. IV, § 402, 96 Stat. 1246, 1246 (codified at 15 U.S.C. § 6a(1)(B) (1982)).

115. See *supra* note 106 and accompanying text.

116. See *Dominicus Americana Bohio v. Gulf & Western Indus.*, 473 F. Supp. 680, 687 (S.D.N.Y. 1979) (any effect which is not *de minimis*); *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92, 103 (C.D. Cal. 1971) (any effect that is not both insubstantial and indirect), *aff'd per curiam* on other grounds, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 450 (1972); *United States v. Watchmakers of Switzerland Information Center*, 1963 Trade Cas. (CCH) ¶ 70,600, at 77,457 (S.D.N.Y. 1962) (substantial and material effect required), *order modified*, 1965 Trade Cas. (CCH) ¶ 71,352 (S.D.N.Y. 1965).

117. Compare *Fleischmann Distilling Corp. v. Distillers Co.*, 395 F. Supp. 221, 227 (S.D.N.Y. 1975) (intent requirement may be satisfied by the rule that a person is presumed to intend the natural consequences of his actions) with *United States v. Aluminum Co. of America*, 148 F.2d 416, 444 (2d Cir. 1945) (finding an intent to affect imports based upon including sales to the United States in production quotas).

118. Compare *United States v. Aluminum Co. of America*, 148 F.2d 416, 444 (2d Cir. 1945) (intent to affect imports as well as the effect are required) with *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297 (3d Cir. 1979) (intent not required, but only one factor in whether to assert jurisdiction).

119. Export Trading Company Act of 1982, Pub. L. No. 97-290, 96 Stat. 1233.

120. Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, tit. IV, 96 Stat. 1246 (codified at 15 U.S.C. § 6a (1982)).

121. 15 U.S.C. § 6a(1)(B) (1982).

direct, substantial, and reasonably foreseeable.<sup>122</sup>

The foreseeability requirement is easily met when bribery is used to gain sales or some other competitive advantage. The effect of usurping a competitor's export opportunities in such a case is more than reasonably foreseeable; it is the very purpose of the bribe. Moreover, in most cases the briber knows who his competitors are. Even if he does not, the briber should expect that one of his competitors will be a U.S. firm, given their frequent presence in international trade. The requirement that the effect be direct poses no more difficulty. When one firm gains sales over another through bribery, the effect of lost exports is about as direct as can be.<sup>123</sup> This is very different from the sort of incidental impact alleged in cases where courts refused to apply the Sherman Act.<sup>124</sup>

The requirement that the effect be substantial causes greater concern. Bribery often leads to the loss of specific sales rather than preclusion from an entire market. Even if this creates a restraint of trade sufficient to violate section 1 in the domestic context, it may not cause a sufficiently large reduction in exports to allow overseas jurisdiction. No clear standard exists as to when the magnitude of effect reaches a substantial level.<sup>125</sup> Perhaps loss of one small contract due to a payoff would not suffice. In any event, few plaintiffs would find it worthwhile to sue a foreign briber over a small contract. Loss of a major contract, however, easily qualifies as a substantial effect under the ordinary meaning of the term.<sup>126</sup> Such a loss creates far more impact than that present in any of the decisions where courts found an inadequate effect to sustain Sherman Act jurisdiction over conduct abroad.<sup>127</sup> It also qualifies under

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122. *Id.* § 6a(1).

123. See *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92, 103 n.15 (C.D. Cal. 1971), *aff'd per curiam* on other grounds, 461 F.2d 92 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972).

124. *National Bank of Canada v. Interbank Card Ass'n*, 666 F.2d 6, 9 (2d Cir. 1981) (Canadian bank excluded from bankcard system argued its cardholders would have used them to make purchases in the United States); *El Cid, Ltd. v. New Jersey Zinc Co.*, 551 F. Supp. 626, 628 (S.D.N.Y. 1982) (foreign plaintiff alleged it would have purchased mining equipment in the United States if defendants' conduct had not prevented it from gaining Bolivian mining concession).

125. See *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 611 (9th Cir. 1976).

126. Cf. *Industria Siciliana Asfalti, Bitumi, S.p.A. v. Exxon Research & Eng'g Co.*, 1977-1 Trade Cas. (CCH) ¶ 61,256 (S.D.N.Y. 1977) (one contract for refinery engineering).

127. See, e.g., *National Bank of Canada v. Interbank Card Ass'n*, 666 F.2d 6, 9 (2d Cir. 1981) (refusal to continue Canadian bank in bankcard system not shown to have any anticompetitive or deleterious effect on U.S. commerce); *Montreal Trading Ltd. v. Amax Inc.*,



court decisions determining whether the Sherman Act applies to intrastate activities. For jurisdiction under the Sherman Act to exist, intrastate activities must substantially affect interstate commerce.<sup>128</sup> In this context, courts find that a small dollar impact is adequate.<sup>129</sup> Since the substantial effect requirement originated in

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661 F.2d 864, 870-71 (10th Cir. 1981) (refusal to sell Canadian company potash mixed in Canada for resale to North Korea had inadequate effect on U.S. commerce), cert. denied, 455 U.S. 1001 (1982); *Eurim-Pharm GmbH v. Pfizer Inc.*, 593 F. Supp. 1102, 1106-07 (S.D.N.Y. 1984) (price fixing in Europe had no effect on U.S. commerce); *Power East Ltd. v. Transamerica Delaval Inc.*, 558 F. Supp. 47, 48 (S.D.N.Y.) (forcing Cypriot company out of business in Saudi Arabia affected neither U.S. competitors nor markets), aff'd mem., 742 F.2d 1439 (2d Cir. 1983); *El Cid, Ltd. v. New Jersey Zinc Co.*, 551 F. Supp. 626, 629-31 (S.D.N.Y. 1982) (preventing foreign company from getting capital for Bolivian gold mining had inadequate effect on U.S. commerce when the company had never before shipped gold to the United States and had only a "vague and undocumented hope" that without the defendant's conduct it would have shipped gold to the United States); *A.G.S. Electronics, Ltd. v. B.S.R. (U.S.A.), Ltd.*, 460 F. Supp. 707, 711-12 (S.D.N.Y.) (termination of Canadian company as a distributor of record players to Canada and Far East did not have any anticompetitive effect on U.S. consumers or exporters), aff'd mem., 591 F.2d 1329 (2d Cir. 1978).

128. *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 241-43 (1980); *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 743 (1976).

129. See *Cardio-Medical Assocs., Ltd. v. Crozer-Chester Medical Center*, 721 F.2d 68, 76 (3d Cir. 1983) (blocking expansion efforts of four cardiologists created a substantial effect on interstate commerce when twelve percent of their patients, accounting for hundreds of thousands of dollars in revenues, came from out of state); *Construction Aggregate Transp., Inc. v. Florida Rock Indus.*, 710 F.2d 752, 768 (11th Cir. 1983) (interference with local trucking company's hauling contract created a substantial effect on interstate commerce by preventing its purchase of rigs from out-of-state supplier); *Palmer v. Roosevelt Lake Log Owners Ass'n, Inc.*, 651 F.2d 1289, 1291-94 (9th Cir. 1981) (interference with family log salvaging business which could supply \$35,000 worth of timber per year to mills selling lumber out of state created a substantial effect on interstate commerce); *Crane v. Intermountain Health Care, Inc.*, 637 F.2d 715, 725 (10th Cir. 1980) (en banc) (excluding one pathologist from a hospital might create a substantial effect on interstate commerce by virtue of his loss of out-of-state patients and inability to make out-of-state purchases of medical supplies); *Feminist Women's Health Center v. Mohammad*, 586 F.2d 530, 539-41 (5th Cir. 1978) (interference with an abortion clinic's attempts to obtain a doctor's services created a substantial effect on interstate commerce when the clinic received approximately \$26,000 in fees from out-of-state patients and spent around \$10,000 for out-of-state equipment), cert. denied, 444 U.S. 924 (1979); *Gough v. Rossmoor Corp.*, 487 F.2d 373, 378 (9th Cir. 1973) (interference with one retailer's sales of carpets from out of state to residences in one subdivision created a substantial effect on interstate commerce; \$50,000 in damages suffered). Moreover, significant authority suggests quantification is unnecessary for showing a substantial effect. See, e.g., *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 233 (1980); *Rasmussen v. American Dairy Ass'n*, 472 F.2d 517, 523-24 (9th Cir.), cert. denied, 412 U.S. 950 (1973). Quantification may also be unnecessary to show substantial effect when applied to foreign commerce. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940) (the amount of interstate or foreign trade involved not material); *United States v. Bayer Co.*, 135 F. Supp. 65, 70 (S.D.N.Y. 1955) (same); *United States v. General Elec. Co.*, 82 F. Supp. 753, 891 (D.N.J. 1949) (substantial effect found even though no showing as to extent of commerce restrained).

the intrastate cases, there is no reason to believe that the term means something different when applied to foreign conduct.<sup>130</sup>

The final question is whether comity precludes application of the Sherman Act to overseas bribery by foreign companies. Courts recently began following a balancing approach to extraterritorial application of the Sherman Act under which they determine whether a foreign nation's interest that U.S. law not apply to conduct within that nation's borders outweighs the U.S. interest created by the conduct's effect on U.S. imports or exports. The Ninth Circuit introduced this approach in *Timberlane Lumber Co. v. Bank of America*.<sup>131</sup> Other circuits, while varying in their precise formulation, followed suit.<sup>132</sup> The legislative history of the Export Trading Company Act shows that Congress did not intend to preclude the use of this approach as long as a direct, substantial, and reasonably foreseeable effect exists.<sup>133</sup>

In weighing these interests, courts examine a number of factors. These include: (1) the degree of conflict between U.S. and foreign law or policy; (2) the nationality of the parties; (3) the relative significance of effects in the United States as opposed to elsewhere; (4) whether the defendant intended to affect U.S. commerce or, if not, whether the effect was foreseeable; (5) the extent of any activ-

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130. *Timberlane Lumber Co. v. Bank of America* noted that the intrastate cases do not require the same analysis as do the cases of extraterritorial application. The latter raise considerations of international comity. But this is an issue different from what quantity of effect should be deemed substantial. *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 612 (9th Cir. 1976).

131. *Id.* at 613-15. In *Timberlane Lumber*, the court replaced the direct and substantial effects standard with a three-part test for jurisdiction over foreign commerce: first, whether there was an intent to affect the foreign commerce of the United States; second, whether that effect constituted an actionable restraint of trade under the Sherman Act; and finally, after balancing foreign and U.S. interests, whether the United States should assert jurisdiction. *Id.* at 615. As formulated, the *Timberlane Lumber* test does not survive the Export Trading Company Act. See *supra* notes 119-22 and accompanying text.

132. See, e.g., *In re Uranium Antitrust Litig.*, 617 F.2d 1248, 1255-56 (7th Cir. 1980) (although not requiring consideration of all balancing factors when defendants were recalcitrant); *National Bank of Canada v. Interbank Card Ass'n*, 666 F.2d 6, 8 (2d Cir. 1981) (although disagreeing with the statement of the effects test contained in the first two parts of the *Timberlane Lumber* formulation); *Montreal Trading Ltd. v. Amax Inc.*, 661 F.2d 864, 869-70 (10th Cir. 1981), cert. denied, 455 U.S. 1001 (1982); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297 (3d Cir. 1979). But see *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984) (comity considerations are limited where fundamentally prejudicial to domestic interests).

133. H.R. Rep. No. 686, 97th Cong., 2d Sess. 3, reprinted in 1982 U.S. Code Cong. & Admin. News 2487, 2498.

ity within the United States; (6) the enforceability of any remedy ordered; (7) the availability of a remedy abroad; (8) the effect of exercising jurisdiction on foreign relations; (9) the U.S. reaction if the roles were reversed; (10) whether the relief demanded will subject the defendant to conflicting requirements under U.S. and foreign law; and (11) the impact of any relevant treaties.<sup>134</sup> Of these factors, the degree of conflict between U.S. and foreign law is the most critical.<sup>135</sup> Indeed, if the nation where the conduct occurs also prohibits it, comity concerns are substantially abated.<sup>136</sup>

Comity should not be an obstacle to application of the Sherman Act to overseas bribery. Unlike much of the conduct condemned by the Sherman Act,<sup>137</sup> virtually all nations prohibit bribery.<sup>138</sup> Admittedly, some countries do not recognize a cause of action for competitors injured by bribes.<sup>139</sup> But this fact strengthens rather than weakens the argument for application of U.S. law. Lack of enforceable remedies for U.S. firms under foreign law is one of the

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134. *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979); *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 614 (9th Cir. 1976).

135. See *Timberlane Lumber Co. v. Bank of America*, 549 F.2d at 614-15.

136. See *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d at 1302 (Adams, J., concurring) ("It is only when foreign law requires conduct *inconsistent* with that mandated by the Sherman Act that problems of international comity become significant.") (emphasis in original). Two recent decisions concluding that the Sherman Act should reach overseas conduct did so in large part because of the absence of any demonstrated conflict with foreign law. See *Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 671 F.2d 876, 884 (5th Cir. 1982), vacated, 460 U.S. 1007, reaff'd per curiam on remand, 704 F.2d 785 (5th Cir.), cert. denied, 464 U.S. 961 (1983); *Daishowa Int'l v. North Coast Export Co.*, 1982-2 Trade Cas. (CCH) ¶ 64,774, at 71,789-90 (N.D. Cal. 1982).

137. See generally 1 J. Atwood & K. Brewster, *Antitrust and American Business Abroad* § 4.03 (2d ed. 1981) (discussing less stringent foreign antitrust policies).

138. See *supra* note 4; see also Lowe, *The Problems of Extraterritorial Jurisdiction: Economic Sovereignty and the Search for a Solution*, 34 *Int'l & Comp. L.Q.* 724, 734 (1985) ("Extraterritorial claims are more likely to be acceptable when used in service of legislation upholding generally-held values, such as personal safety and perhaps the prevention of corrupt practices, than when used to advance more parochial policies, as is the case in much competition, tax and export administration legislation.").

139. Unfair competition statutes in both Switzerland and West Germany define bribery as an unfair practice and provide competitors with a cause of action. See *Loi fédérale sur la concurrence déloyale*, art. 1, para. 2(e), *Systematische Sammlung des Bundesrechts* 241, *Recueil systematique du droit fédéral* 241, *Raccolta sistematica del diritto federale* 241 (Switz.) (Federal Unfair Competition Act); *Gesetz gegen den unlauteren Wettbewerb* §§ 12, 13, 1909 *RGBI* 499, 502 (as amended) (W. Ger.) (Act Against Unfair Competition). Other nations have laws providing competitors with a cause of action for unfair competition, but not expressly stating that bribery constitutes such an act. See, e.g., Z. Kitagawa, *Doing Business in Japan* §§ 6.02, 11.03 (1984); Wengler, *Laws Concerning Competition and Conflict of Laws*, 4 *Am. J. Comp. L.* 167, 168 (1955).

factors courts consider under the balancing test. The presence of this factor weighs in favor of asserting jurisdiction by increasing U.S. interest.<sup>140</sup> For example, in *Daishowa International*, the district court decided to exercise jurisdiction primarily because of an apparent lack of conflict between U.S. and Japanese law concerning the legality of the Japanese firms' conduct coupled with the absence of any remedy under Japanese law for the U.S. firm.<sup>141</sup> In such a situation, providing additional remedies for conduct condemned where it occurs complements local enforcement efforts.<sup>142</sup> Thus, comity should not preclude jurisdiction when the country in which the bribe occurs prohibits bribery but grants no cause of action for injured competitors. There is less conflict, and hence even fewer comity concerns, when the country recognizes such a cause of action but does not provide for recovery of treble damages as does the United States.<sup>143</sup>

### C. *The Federal Trade Commission Act*

Section 5 of the FTC Act proscribes unfair conduct "in or affect-

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140. See *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297 (3d Cir. 1979) (availability of a foreign remedy is one factor in balancing test); *Timberlane Lumber Co. v. Bank of America*, 574 F. Supp. 1453, 1470-71 (N.D. Cal. 1983) (one factor in convincing the court to dismiss under the comity test was that the plaintiff availed himself of the full opportunity to litigate the issue in Honduras), *aff'd*, 749 F.2d 1378 (9th Cir. 1984), *cert. denied*, 472 U.S. 1032 (1985); 1 J. Atwood & K. Brewster, *supra* note 137, § 6.19 (discussing the balancing test for United States assertion of jurisdiction).

141. *Daishowa Int'l v. North Coast Export Co.*, 1982-2 Trade Cas. (CCH) ¶ 64,774, at 71,789-90 (N.D. Cal. 1982).

142. This is the reasoning behind recognizing a private cause of action for violation of U.S. regulatory statutes. See *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299 (1985) (precluding plaintiff's private cause of action under securities laws would interfere with enforcement of those laws); *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964) (recognizing a private cause of action under section 14(a) of the Securities Exchange Act of 1934).

143. See Restatement (Second) of Foreign Relations Law of the United States § 19 comment c, illus. 3 (1965) (a nation may apply its own law on the measure of damages in private adjudication concerning conduct prohibited where it occurred even if the nation lacked jurisdiction to proscribe the conduct). But see Protection of Trading Interests Act, 1980, ch. 11, § 6 (British statute providing defendants a cause of action to recover the portion of foreign multiple damage awards exceeding the compensatory amount). The British explain their opposition to treble damages on two grounds. Letter from British Embassy, *supra* note 97. The first is the encouragement such damages provide to private plaintiffs who will not consider competing national policies before bringing suit. Given the lack of competing national policies regarding bribery (as opposed to cartels and similar behavior regulated by the Sherman Act), this rationale is inapposite here. The second expressed concern is double jeopardy. The British act, however, does not appear particularly tailored to such a concern.



ing commerce."<sup>144</sup> The Act, in turn, defines "commerce" to include trade with foreign nations.<sup>145</sup> This means that unfair conduct, such as bribery, which impedes U.S. export opportunities comes within the literal reach of the section.<sup>146</sup> Far fewer cases involving extraterritorial conduct, however, have been brought under the FTC Act than under the Sherman Act. Still, the FTC has prosecuted a number of firms for engaging in activities overseas which prejudiced their U.S. competitors.<sup>147</sup> This includes actions against businesses committing bribery abroad.<sup>148</sup>

These prosecutions, however, were against U.S. companies.<sup>149</sup> The court in *Branch v. FTC*,<sup>150</sup> the leading case involving extraterritorial application of the FTC Act, emphasized this fact. Indeed, the pre-1975 language of section 5 may have effectively limited its reach to U.S. firms. Prior to 1975, the section only reached conduct "in commerce."<sup>151</sup> The Supreme Court held this to mean that the unfair conduct must be committed by a business involved in buying or selling goods or services between the states or between the United States and foreign nations.<sup>152</sup> It was not enough that the

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144. FTC Act § 5, 15 U.S.C. § 45(a)(1) (1982).

145. Id. § 4, 15 U.S.C. § 44 (1982).

146. Indeed, to the extent a company engaged in export trade from the United States commits an unfair act against another U.S. exporter, Congress is even more explicit in providing jurisdiction. Section 4 of the Webb-Pomerene Export Company Act, ch. 50, § 4, 40 Stat. 517, amended the FTC Act to prohibit unfair methods of competition used in export trade against domestic competitors even if done outside the country. 15 U.S.C. § 64 (1982). Since the entire thrust of the Webb-Pomerene Act concerns the regulation of U.S. exporters, no significance can be attached to the failure of section 4 to go beyond these companies.

147. See, e.g., *Branch v. FTC*, 141 F.2d 31 (7th Cir. 1944) (false advertising in Latin America by correspondence school misrepresenting itself as accredited); *FTC v. Nestle's Food Co.*, 2 F.T.C. 171 (1919) (false advertising by exporter of milk to Mexico seeking to gain advantage over U.S. competitors).

148. See *In re McDonnell Douglas Corp.*, 92 F.T.C. 976 (1978) (consent order requiring ending payments to foreign officials to secure purchase of aircraft); *In re Boeing Co.*, 92 F.T.C. 972 (1978) (same); *In re Lockheed Corp.*, 92 F.T.C. 968 (1978) (same); *FTC v. United Indigo & Chem. Co.*, 3 F.T.C. 425 (1921) (enjoined commercial bribery in the United States and abroad).

149. But see *FTC v. United Indigo & Chem. Co.*, 3 F.T.C. 425 (1921) (enjoined British corporation headquartered in the United States).

150. *Branch v. FTC*, 141 F.2d 31 (7th Cir. 1944). *Branch* upheld a cease and desist order against a correspondence school which used fraudulent practices to sell courses in Latin America. In finding section 5 of the FTC Act applicable, the court emphasized both that a U.S. citizen perpetrated the fraud and that the fraud prejudiced other U.S. citizens selling courses in the region. Id. at 35.

151. FTC Act, ch. 311, § 5, 36 Stat. 717, 719 (1914).

152. See *FTC v. Bunte Bros.*, 312 U.S. 349 (1941). The Court held that since Congress did not explicitly state its intent to regulate intrastate sales which affect interstate competitors,

conduct simply affect such trade.<sup>153</sup>

In a 1975 amendment,<sup>154</sup> Congress expanded the coverage of section 5 to encompass acts "in or affecting commerce."<sup>155</sup> The legislative history of this amendment indicates that its goal was to reach local activities which affect interstate trade.<sup>156</sup> Congress evidently did not consider the amended FTC Act's application to overseas conduct which affects U.S. exports. Nevertheless, the impact of the amendment was to make section 5 of the FTC Act coextensive in its overseas reach with the Sherman Act.<sup>157</sup> The Export Trading Company Act of 1982<sup>158</sup> reinforces the conclusion that section 5 has the same extraterritorial reach as the Sherman Act. In addition to clarifying the application of the Sherman Act to conduct impeding U.S. exports, the 1982 Act engrafted parallel language onto section 5.<sup>159</sup> Accordingly, if the Sherman Act covers bribery by foreign companies abroad, the FTC Act should as well.

#### D. *The Robinson-Patman Act*

The prohibitions in section 2(c) of the Robinson-Patman Act extend only to conduct by parties "engaged in commerce, in the course of such commerce."<sup>160</sup> This language is much more restric-

section 5 of the FTC Act did not bring such activity within the jurisdiction of the FTC. *Id.* at 351.

153. *Id.* at 355.

154. Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, § 201(a), 88 Stat. 2183, 2193 (1975).

155. 15 U.S.C. § 45(a) (1982).

156. See H.R. Rep. No. 1107, 93d Cong., 2d Sess. 31, reprinted in 1974 U.S. Code Cong. & Admin. News 7702, 7713 ("It is unrealistic to restrict the jurisdiction of the FTC under section 5 of the Act to only interstate transactions.").

157. Compare 15 U.S.C. § 45(a) (1982) (FTC Act) with 15 U.S.C. § 1 (1982) (Sherman Act).

158. Export Trading Company Act of 1982, Pub. L. No. 97-290, 96 Stat. 1233.

159. Compare 15 U.S.C. § 6a(1) (1982). Section 5(a) of the FTC Act, as amended by the Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, tit. IV, § 403, 96 Stat. 1246, 1246, reads in pertinent part:

(3) This subsection shall not apply to unfair methods of competition involving commerce with foreign nations (other than import commerce) unless—

(A) such methods of competition have a direct, substantial, and reasonably foreseeable effect—

(i) on commerce which is not commerce with foreign nations, or on import commerce with foreign nations; or

(ii) on export commerce with foreign nations, of a person engaged in such commerce in the United States . . .

15 U.S.C. § 45(a)(3) (1982).

160. Robinson-Patman Act § 2(c), 15 U.S.C. § 13(c) (1982).

tive than either section 1 of the Sherman Act<sup>161</sup> or section 5 of the FTC Act as amended.<sup>162</sup> As a result, application of section 2(c) to overseas bribery by foreign companies involves three issues not raised by the other two statutes.

First, there is some question whether section 2(c) reaches any extraterritorial conduct, at least when the conduct does not involve a sale to the United States. Since the Robinson-Patman Act is an amendment to the Clayton Act,<sup>163</sup> the Clayton Act's definition of "commerce" should govern section 2(c). This definition appears to contemplate extraterritorial application for it includes "trade or commerce . . . with foreign nations."<sup>164</sup> Nevertheless, one commentator argues that section 2(c) should be limited to domestic trade (or else imports), since its purpose is to complement section 2(a) of the Robinson-Patman Act.<sup>165</sup> Section 2(a),<sup>166</sup> unlike section 2(c), is expressly limited to price discrimination in the sale of commodities for "use, consumption, or resale within the United States."<sup>167</sup> This argument, however, ignores the difference in language between sections 2(a) and 2(c),<sup>168</sup> as well as the definition of "commerce" under the Clayton Act.<sup>169</sup> Moreover, one of the principal drafters of the Robinson-Patman Act contradicts the position.<sup>170</sup> It is not surprising, therefore, that the only two courts to consider the argument rejected it.<sup>171</sup> Indeed, in *Canadian Inger-*

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161. See *supra* note 23.

162. See *supra* note 44.

163. Robinson-Patman Act, ch. 592, § 1, 49 Stat. 1526, 1526 (1936).

164. Clayton Act § 1, 15 U.S.C. § 12 (1982).

165. F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 82 (1962). This argument is analogous to that made against applying section 2(c) to commercial bribery when there is no discriminatory effect.

166. Robinson-Patman Act § 2(a), 15 U.S.C. § 13(a) (1982).

167. Section 2(a) of the Robinson-Patman Act reads in pertinent part:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States . . . .

15 U.S.C. § 13(a) (1982).

168. Compare *supra* note 167 (language of Robinson-Patman Act § 2(a)) with *supra* note 59 (language of Robinson-Patman Act § 2(c)).

169. See *supra* note 164 and accompanying text.

170. See W. Patman, *The Robinson-Patman Act* 208 (1938).

171. See *Canadian Ingersoll-Rand Co. v. D. Loveman & Sons*, 227 F. Supp. 829, 833 (N.D. Ohio 1964); *Baysoy v. Jessop Steel Co.*, 90 F. Supp. 303, 305 (W.D. Pa. 1950).

*soll-Rand Co. v. D. Loveman & Sons*,<sup>172</sup> the United States District Court for the Northern District of Ohio applied section 2(c) to bribes paid by a U.S. company to a Canadian firm's purchasing agent.<sup>173</sup>

Although *Canadian Ingersoll-Rand* condones the prosecution of U.S. firms for bribery abroad under section 2(c), applying that section to a foreign company may be more difficult since the defendant must be "engaged in commerce."<sup>174</sup> This language requires that the defendant make purchases or sales between states or between the United States and other nations.<sup>175</sup> Still, this language does not rule out all actions against overseas competitors who bribe abroad. Large foreign firms which compete with U.S. exporters may also purchase from or sell goods to the United States, thereby meeting the requirement.<sup>176</sup>

A third barrier may preclude application of section 2(c) even against this class of defendants. Section 2(c) requires that the challenged conduct occur "in the course of such commerce."<sup>177</sup> The narrowest interpretation of this clause requires that the illegal payment relate to a sale by the defendant which crosses state lines or where goods are imported to or exported from the United States, i.e., a sale in the flow of commerce.<sup>178</sup> This leaves only two situations in which section 2(c) might arguably apply to overseas bribery by a foreign company. The first is when a foreign company uses the bribe to resell goods which it purchased from the United States, that is, when the company is a distributor of U.S. products. A second and potentially far more common situation is when the foreign firm incorporates goods purchased in the United States into its own product.

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172. *Canadian Ingersoll-Rand Co. v. D. Loveman & Sons*, 227 F. Supp. 829 (N.D. Ohio 1964).

173. *Id.* at 833-34.

174. Robinson-Patman Act § 2(c), 15 U.S.C. § 13(c) (1982).

175. See *United States v. American Bldg. Maintenance Indus.*, 422 U.S. 271, 275-83 (1975); *Rangen, Inc. v. Sterling Nelson & Sons*, 351 F.2d 851, 860-61 (9th Cir. 1965), cert. denied, 383 U.S. 936 (1966).

176. Indeed, these are the sort of companies over which personal jurisdiction in the United States may be most readily obtained. See *supra* note 79 and accompanying text.

177. Robinson-Patman Act § 2(c), 15 U.S.C. § 13(c) (1982).

178. One district court has applied this construction to section 2(c) in a case involving alleged price discrimination on sales of furniture within state lines. See *Rohrer v. Sears, Roebuck & Co.*, 1975-1 Trade Cas. (CCH) ¶ 60,352, at 66,480 (E.D. Mich. 1975); see also *Harold Friedman, Inc. v. Thorofare Mkts.*, 587 F.2d 127, 135 n.27 (3d Cir. 1978) (*dicta* referring to restrictive interpretations of the Clayton Act and the Robinson-Patman Act).



Some authority suggests that local sales of products made from ingredients purchased out of state are, by virtue of that fact, still in the flow of commerce.<sup>179</sup> Most courts, however, hold that the transformation of goods into a new product interrupts the flow, thereby making the subsequent sale entirely local or foreign.<sup>180</sup> Even when the defendant does not physically alter the goods but simply resells them, courts generally hold that the resale is not in the flow of commerce.<sup>181</sup> Courts do make exceptions when the defendant purchases the goods to fill the special order of the ultimate customer, pursuant to an understanding with the final buyer, or based upon the anticipated needs of specific consumers.<sup>182</sup> These exceptions leave little room for section 2(c) to apply to a bribe made abroad by a foreign firm.

Fortunately, there is support for a broader interpretation of the "in the course of such commerce" clause based on the difference between sections 2(a) and 2(c). Courts hold that section 2(a) re-

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179. See, e.g., *Rasmussen v. American Dairy Ass'n*, 472 F.2d 517, 525 (9th Cir.) (intrastate sales of filled milk may be in the flow of commerce for Sherman Act jurisdiction when the milk was made from ingredients (except for the water) purchased out of state), cert. denied, 412 U.S. 950 (1973); *Dean Milk Co. v. FTC*, 395 F.2d 696, 715 (7th Cir. 1968) (intrastate sales of processed milk were in the flow of commerce for the purpose of section 2(a) of the Robinson-Patman Act when the processor purchased some of the raw milk out of state). In *Fitch v. Kentucky-Tennessee Light & Power Co.*, 136 F.2d 12 (6th Cir. 1943), the court noted that the plaintiff power company turned the defendant's coal into energy which it then sold out of state. The court suggested that this alone would be sufficient to meet the commerce requirement of section 2(c). *Id.* at 17. This was merely dicta, however, since the coal sales themselves crossed state lines. Moreover, it is unclear whether the court was relying on a "flow of commerce" or an "affecting commerce" analysis. See *id.* at 16-17.

180. See, e.g., *Belliston v. Texaco, Inc.*, 455 F.2d 175, 178-81 (10th Cir.), cert. denied, 408 U.S. 928 (1972); *Rangen, Inc. v. Sterling Nelson & Sons*, 351 F.2d 851, 860 (9th Cir. 1965), cert. denied, 383 U.S. 936 (1966); *Central Ice Cream Co. v. Golden Rod Ice Cream Co.*, 287 F.2d 265, 267 (7th Cir.), cert. denied, 368 U.S. 829 (1961); *Miles v. Coca-Cola Bottling Co.*, 360 F. Supp. 869, 871 (E.D. Wis. 1973).

181. See, e.g., *Hampton v. Graff Vending Co.*, 516 F.2d 100 (5th Cir. 1975); *Cliff Food Stores v. Kroger, Inc.*, 417 F.2d 203, 209-10 (5th Cir. 1969). But see *Northern California Pharmaceutical Ass'n v. United States*, 306 F.2d 379, 386-87 (9th Cir.) (retailers' resale of prescription drugs shipped from out of state does not stop the flow of interstate commerce before the drugs reach consumers), cert. denied, 371 U.S. 862 (1962).

182. See, e.g., *Hampton v. Graff Vending Co.*, 516 F.2d 100, 102-03 (5th Cir. 1975) (plaintiff did not establish that intrastate resales of chewing gum fell within any of the three circumstances in which such sales are considered to be in interstate commerce); *Cliff Food Stores v. Kroger, Inc.*, 417 F.2d 203, 210 (5th Cir. 1969) (listing exceptions to the general rule that retail sales of groceries to the general public are not in commerce); see also *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 568-69 (1943) (goods procured from out of state by a local merchant to fulfill prior orders or contracts with customers are "in commerce" within the meaning of the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1940)).

quires that one of the sales involved in the price discrimination must cross state lines.<sup>183</sup> Section 2(a), however, contains a third jurisdiction clause that is not found in section 2(c). In addition to requiring that the defendant be "engaged in commerce" and "in the course of such commerce," section 2(a) also requires that "either or any of the purchases involved" must be "in commerce."<sup>184</sup> This added language distinguishes cases involving section 2(a).<sup>185</sup> More significantly, this clause carries a negative implication concerning the prior provision. Interpreting the language of section 2(c) to require that the illegal payment occur in the flow of commerce renders the third jurisdiction clause in section 2(a) redundant.<sup>186</sup>

Courts have suggested two other interpretations of the "in the course of such commerce" clause which give it a meaning different from the third jurisdiction clause in section 2(a) and which could make section 2(c) applicable to overseas bribery by foreign companies. The Ninth Circuit's opinion in *Rangen, Inc. v. Sterling Nelson & Sons*<sup>187</sup> provides one theory. *Rangen* involved bribery by a company making interstate sales, but the sales obtained through the bribes did not cross state lines.<sup>188</sup> Nevertheless, the court held that the bribes occurred during the course of the defendant's inter-

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183. See, e.g., *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974); *Borden Co. v. FTC*, 339 F.2d 953, 955 (7th Cir. 1964).

184. Robinson-Patman Act § 2(a), 15 U.S.C. § 13(a) (1982).

185. See *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. at 200 ("[T]he Courts of Appeals have read the language requiring that 'either or any of the purchases involved in such discrimination [be] in commerce' to mean that § 2(a) applies only where 'at least one of the two transactions which, when compared, generate a discrimination . . . cross[es] a state line.'"') (emphasis added) (alterations in original); *Borden Co. v. FTC*, 339 F.2d 953, 955 (7th Cir. 1964) ("[U]nless the third commerce requirement of Section 2(a) is to be given no effect whatever, the Commission's burden of establishing jurisdiction cannot be discharged merely by a showing that respondent is an interstate concern or that it makes interstate sales not involved in the challenged discrimination.") (emphasis added) (quoting FTC Comm'r Elman with approval).

186. See *Clausen & Sons v. Theo. Hamm Brewing Co.*, 284 F. Supp. 148, 156 (D. Minn. 1967) (the "in commerce" language of section 2(a) implies that an activity can be in the course of interstate commerce without involving interstate transactions), rev'd on other grounds, 395 F.2d 388 (8th Cir. 1968). However, the court in *Rohrer v. Sears, Roebuck & Co.*, 1975-1 Trade Cas. (CCH) ¶ 60,352, at 66,480 (E.D. Mich. 1975), held that section 2(c) has the same jurisdictional reach as section 2(a) since the purpose of section 2(c) is to complement section 2(a). As noted earlier, this reasoning ignores the difference in language between the two provisions.

187. *Rangen, Inc. v. Sterling Nelson & Sons*, 351 F.2d 851 (9th Cir. 1965), cert. denied, 383 U.S. 936 (1966).

188. *Id.* at 860.

state commerce, reasoning that the local sales obtained through bribes aided the defendant in its interstate competition.<sup>189</sup> In support of this position, the *Rangen* court quoted from the Supreme Court's decision in *Moore v. Mead's Fine Bread Co.*<sup>190</sup> *Moore* involved a section 2(a) claim against a bakery which lowered its price for in-state sales below its out-of-state prices. In finding that section 2(a) could reach this conduct, the Court discussed the need to prevent nationwide companies from subsidizing local price wars with profits from interstate operations.<sup>191</sup> The *Rangen* court turned this around to argue that if the Robinson-Patman Act can reach local price cutting because it is aided by interstate sales, then it can also reach local bribery because it may aid interstate sales.<sup>192</sup>

This approach is flawed in two respects. First, it is not clear that the *Moore* opinion is discussing the statutory requirements of section 2(a) when referring to the dangers of subsidizing local price wars with profits from interstate operations.<sup>193</sup> Moreover, whatever the merits of the legal logic in *Rangen*, its factual predicate is uncertain.<sup>194</sup> The Court never explains how the local sales aided the defendant's interstate efforts. There is no indication, for instance, that profits from the local sales subsidized below-cost pricing in the interstate market. Nevertheless, *Rangen* provides the foundation for an argument against foreign bribers who also sell in the United States. A U.S. competitor may assert, with as much authority as the plaintiff in *Rangen*, that the briber's foreign sales aid its competition in the United States. If the bribe involves the same product sold by the foreign company in this country and the U.S. firm also sells in the United States, the situation is indistinguishable from *Rangen*.<sup>195</sup>

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189. *Id.* at 860-61.

190. *Id.* at 861 (quoting *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115, 119 (1954)).

191. *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115, 119-20 (1954).

192. *Rangen, Inc. v. Sterling Nelson & Sons*, 351 F.2d at 861.

193. See *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 n.17 (1974) (the language in *Moore* "spoke to the commerce power rather than to jurisdiction under § 2(a)").

194. See Note, *Bribery and Brokerage: An Analysis of Bribery in Domestic and Foreign Commerce Under Section 2(c) of the Robinson-Patman Act*, 76 Mich. L. Rev. 1343, 1356-58 (1978) (concluding that *Rangen* provides little factual guidance).

195. The Ninth Circuit suggested that it still adheres to *Rangen*'s jurisdictional theory. See *May Dep't Store v. Graphic Process Co.*, 637 F.2d 1211, 1216 (9th Cir. 1980) (citing *Rangen* for the proposition that the "interstate character" of the plaintiff and its competitor, who allegedly secured business through bribes, "may provide a sufficient commerce nexus to meet the jurisdictional requirement"); see also *Clausen & Sons v. Theo. Hamm*

Another possible interpretation of the "in the course of such commerce" clause is that it refers to any activity, even a local or foreign one, by a firm which engages in commerce if the activity affects commerce—in essence, combining the requirement that the defendant buy or sell between states or between the United States and foreign countries with the effects test. While this interpretation admittedly does some violence to the actual language of section 2(c), there are both cases and sound policy reasons to support such a construction.

Two Supreme Court decisions dealing with the reach of section 3 of the Clayton Act provide the principal authority. This section prohibits anticompetitive exclusive dealing arrangements by anyone "engaged in commerce, in the course of such commerce";<sup>196</sup> in other words, it has the same jurisdiction clause as section 2(c). The issue of the jurisdictional reach of section 3 came before the Supreme Court in *Gulf Oil Corp. v. Copp Paving Co.*<sup>197</sup> The plaintiff and the United States as *amicus curiae* urged the Court to hold that section 3 reaches acts affecting interstate trade even if those acts do not occur in the flow of commerce.<sup>198</sup> Rather than summarily rejecting the argument, the Court declined to resolve the issue because there was no evidence that the defendant's activities had any effect on interstate trade.<sup>199</sup> Although expressing doubts about such a broad interpretation, the Court noted that its decision in *Standard Oil Co. of California v. United States*<sup>200</sup> supports this construction.<sup>201</sup>

*Standard Oil* involved a challenge to exclusive supply contracts with operators of service stations both in California, from which

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Brewing Co., 284 F. Supp. 148, 157 (D. Minn. 1967) (following *Rangen* in construing "in the course of such commerce" within the meaning of section 3 of the Clayton Act), rev'd on other grounds, 395 F.2d 388 (8th Cir. 1968).

196. Clayton Act § 3, 15 U.S.C. § 14 (1982).

197. *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186 (1974).

198. *Id.* at 201-02. The position urged upon the Court in *Gulf Oil Corp. v. Copp Paving Co.* went beyond what is suggested here. It also subsumed the "engaged in commerce" clause into the effects test. The Supreme Court's subsequent decision in *United States v. American Bldg. Maintenance Indus.*, 422 U.S. 271 (1975), precludes such an interpretation. In *American Building Maintenance*, the Court held that the phrase "engaged in commerce," used in section 7 of the Clayton Act, means that the company must actually be involved in buying or selling goods or services in interstate trade. *Id.* at 283. This still leaves open the meaning of the phrase "in the course of such commerce."

199. *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. at 202.

200. *Standard Oil Co. of California v. United States*, 337 U.S. 293 (1949).

201. *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. at 202.



Standard Oil supplied products, and outside the state.<sup>202</sup> The Supreme Court rejected the company's argument that the district court should have exempted the contracts with California service stations from its decree because they only involved intrastate sales.<sup>203</sup> In doing so, the Court used an effects on commerce test, noting that the contracts precluded out-of-state suppliers from selling to the California stations.<sup>204</sup> By using an effects test, the Court may only have been following the defendant's lead—as the defendant couched its argument in terms of a lack of effect by the California contracts on interstate commerce<sup>205</sup>—and may not have focused on the jurisdictional language in section 3. Moreover, one commentator argues that the Supreme Court could have reached the result on narrower grounds.<sup>206</sup> Nevertheless, the holding in *Standard Oil* coalesces perfectly with the notion that any acts, local or foreign, by firms which engage in commerce that preclude the interstate or foreign trade of competitors meet the requirement of occurring “in the course of such commerce.”<sup>207</sup> Under this reading, section 2(c) applies to overseas bribery by foreign companies to the same extent as do the Sherman and FTC Acts except for the added requirement that the foreign company purchase from or sell to the United States.

This interpretation of section 2(c) of the Robinson-Patman Act and section 3 of the Clayton Act is supported by various policy considerations. It enables courts to interpret the Clayton Act and

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202. *Standard Oil Co. of California v. United States*, 337 U.S. at 295.

203. *Id.* at 314-15.

204. *Id.* at 309.

205. *Id.* at 304 n.6.

206. See 3 J.O. von Kalinowski, *Antitrust Laws and Trade Regulation* § 12.03[3], at 59 (1969).

207. See *Fitch v. Kentucky-Tennessee Light & Power Co.*, 136 F.2d 12, 16-17 (6th Cir. 1943) (court appears to equate “occurring in the course of commerce” with “affecting commerce”). Since *Gulf Oil Corp. v. Copp Paving Co.*, lower courts have disagreed over whether section 3 reaches contracts which affect commerce, at least if the defendant engages in interstate trade, even if the contracts themselves do not involve the sale of goods or services between states. Compare *Kane v. Martin Paint Stores*, 1975-1 Trade Cas. ¶ 60,176, at 65,576 (S.D.N.Y. 1975) (contract between local franchisee and national franchisor violated section 3 of Clayton Act because of the effect on interstate commerce) with *Chatham Condominium Ass'n v. Century Village, Inc.*, 597 F.2d 1002, 1010-11 (5th Cir. 1979) (99-year lease requirement occurred during the flow of interstate commerce, thus violating section 3 of Clayton Act, because the condominium lessor purchased and sold out-of-state goods and services); see also *Detroit City Dairy v. Kowalski Sausage Co.*, 393 F. Supp. 453, 476 (E.D. Mich. 1975) (section 3 of the Clayton Act does not require an “actual interstate sale,” but “only that the illegal activity occur in the course of interstate commerce”).

the Sherman Act in a more complementary fashion, which is consistent with the overall purpose of the Clayton Act.<sup>208</sup> It also makes the application of section 2(c) to overseas bribery more rational. Under *Canadian Ingersoll-Rand Co. v. D. Loveman & Sons*,<sup>209</sup> foreign companies may sue U.S. nationals for bribery committed abroad.<sup>210</sup> Under the narrow interpretation of section 2(c)'s jurisdiction clause, however, U.S. nationals may not sue foreign bribers. This is anomalous in that the section then applies when the United States has a limited interest in protecting competitors from bribery, but does not apply when the United States has a substantial interest. The broader interpretation avoids this result.

#### IV. COMPLICATIONS CAUSED BY THE INVOLVEMENT OF FOREIGN GOVERNMENTS IN OVERSEAS BRIBERY

When considering whether to apply U.S. law to bribery committed overseas by non-U.S. nationals, it is also necessary to consider the role of foreign governments. Foreign governments, acting through state-owned enterprises, may engage in bribery which disadvantages U.S. firms. More commonly, however, the foreign government becomes involved when its official receives a bribe. In the former case, the briber might assert the defense of sovereign immunity. In the latter situation, the briber might seek shelter behind the act of state doctrine, the sovereign compulsion defense, or the *Noerr-Pennington* doctrine. But, as will be seen, none of these defenses should normally present insurmountable barriers to prosecution for bribery under U.S. antitrust laws.

##### A. *Sovereign Immunity*

When a foreign government owns a company which made a bribe, the company may assert the defense of sovereign immunity. Although such a company is a government instrumentality,<sup>211</sup> the

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208. See, e.g., *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 201 (1974) (sections 3 and 7 of the Clayton Act "were intended to complement the Sherman Act and to facilitate achievement of its purposes"); see also *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 589 (1957) (section 7 of the Clayton Act is intended "to arrest in its incipency" substantial lessening of competition from corporate acquisitions, and restraints or monopolies likely to result from an acquisition).

209. *Canadian Ingersoll-Rand Co. v. D. Loveman & Sons*, 227 F. Supp. 829 (N.D. Ohio 1964).

210. See *supra* notes 172-73 and accompanying text.

211. The Foreign Sovereign Immunities Act defines an "agency or instrumentality of a

defense should not succeed in this context. The Foreign Sovereign Immunities Act<sup>212</sup> (FSIA) denies immunity to a government's commercial activity.<sup>213</sup> The use of bribery to make a sale or otherwise gain a competitive advantage easily comes within the perimeters of commercial activity.<sup>214</sup>

### B. *The Act of State Doctrine*

The act of state doctrine is a more formidable defense. It mandates that domestic courts abstain from adjudicating the validity of actions taken by foreign governments on their own territory.<sup>215</sup> Neither international law nor the Constitution require such abstention; rather, this is a self-imposed rule of judicial restraint.<sup>216</sup> Early cases suggest that it was founded upon considerations of international comity.<sup>217</sup> More recent pronouncements by the Supreme Court link the rule, however, to a separation of powers concern, namely the need not to interfere with the executive branch in the conduct of foreign policy.<sup>218</sup> The act of state doctrine differs

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foreign state" as

any entity—

- (1) which is a separate legal person, corporate or otherwise, and
- (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
- (3) which is neither a citizen of a State of the United States . . . , nor created under the laws of any third country.

28 U.S.C. § 1603(b) (1982).

212. Foreign Sovereign Immunities Act of 1976 (FSIA), Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1602-1611 (1982)).

213. 28 U.S.C. § 1605(a)(2) (1982).

214. Cf. *Outboard Marine Corp. v. Pezetel*, 461 F. Supp. 384 (D. Del. 1978) (a Polish government-controlled entity involved in the manufacture and sale of golf carts under agreements with U.S. distributors to sell only in assigned territories was engaged in commercial activity under the FSIA).

215. See generally *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (applying the act of state doctrine to a foreign expropriation, even when the expropriation allegedly violated customary international law); *Underhill v. Hernandez*, 168 U.S. 250 (1897) (act of state doctrine barred inquiry into acts of a foreign military commander whose government was later recognized by the United States).

216. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 427-28. The rule also binds state courts. *Id.* at 425-27.

217. See, e.g., *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303-04 (1918) (the act of state doctrine "rests at last upon the highest considerations of international comity and expediency"); *Underhill v. Hernandez*, 168 U.S. at 252 ("Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.").

218. See, e.g., *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 765-68 (1972); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 431-33.

from sovereign immunity in that private as well as governmental defendants may invoke it as a defense.<sup>219</sup>

The case of *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*<sup>220</sup> demonstrates how the act of state doctrine may impede the prosecution of individuals who bribe foreign officials. Clayco Petroleum Corp. ("Clayco") brought suit against Occidental Petroleum Corp. ("Occidental") for violating the Sherman and Robinson-Patman Acts after SEC-imposed disclosure revealed that Occidental had obtained an offshore oil concession (which Clayco claimed was promised to it) by bribing the petroleum minister of Umm Al Qaywayn in the United Arab Emirates.<sup>221</sup> The district court dismissed the suit on act of state grounds and the Ninth Circuit affirmed, reasoning that the underlying dispute involved a sovereign decision on how to exploit the sheikdom's natural resources.<sup>222</sup> It then held that the act of state doctrine forbids inquiry into whether bribery motivated this decision.<sup>223</sup>

Despite this result, most actions involving bribery of foreign officials should survive an act of state challenge. Whether the defense applies in a given case depends upon an evaluation of all the facts and circumstances.<sup>224</sup> When dealing with bribery, the most important facts are the nature of the government action which the briber obtained and the impact of the bribe itself on the policies behind judicial abstention in this area.

Traditionally, the act of state doctrine has been used when the foreign government expropriated property.<sup>225</sup> Indeed, almost all of the Supreme Court decisions invoking the doctrine have involved

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219. *Williams v. Curtiss-Wright Corp.*, 694 F.2d 300, 302-03 (3d Cir. 1982); *International Ass'n of Machinists and Aerospace Workers v. OPEC*, 649 F.2d 1354, 1359 (9th Cir. 1981), cert. denied, 454 U.S. 1162 (1982).

220. *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404 (9th Cir. 1983) (per curiam), cert. denied, 464 U.S. 1040 (1984).

221. The oil minister was also the son of the ruler. *Id.* at 405.

222. *Id.* at 408.

223. *Id.* at 407-08. In some ways this case belongs in the category "turn about is fair play." Several years earlier Occidental lost the concession when Clayco convinced the ruler of neighboring Sharja to assert jurisdiction over the waters in question. Occidental sued Clayco and its confederates but the suit was dismissed on act of state grounds. *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal. 1971), aff'd per curiam, 461 F.2d 1261 (9th Cir.), cert. denied, 409 U.S. 950 (1972).

224. Cf. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964) (declining to lay down "an inflexible and all-encompassing rule").

225. Restatement of Foreign Relations Law of the United States (Revised) § 469 comment c (Tent. Draft No. 7, 1986).



expropriations.<sup>226</sup> In these cases, the policy reasons behind the rule are most evident. Expropriations typically lead the injured parties to seek help from the executive branch, which endeavors through diplomatic channels to obtain compensation.<sup>227</sup> Judicial involvement in determining the legality of the seizure can easily embarrass these diplomatic efforts. A decision that the taking is valid could undermine State Department negotiations by offending the foreign government. Even a ruling that the taking is invalid could disrupt efforts to negotiate a diplomatic solution.<sup>228</sup> Similar concerns do not readily apply to most of the types of actions obtained by payoffs to foreign officials.

Bribes can be directed toward three types of government action which prejudice competitors.<sup>229</sup> They may be employed to obtain a government procurement contract.<sup>230</sup> They may also be used to obtain access to resources controlled by the government.<sup>231</sup> Finally, they may be directed at obtaining regulation or other government action which impedes a competitor's ability to do business in a country. For example, the briber may seek a patent or other grant of monopoly rights.<sup>232</sup> Alternatively, the briber may want the local

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226. See *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937); *Ricaud v. American Metal Co.*, 246 U.S. 297 (1918); *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918); *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909). Two Supreme Court decisions concerning the act of state doctrine do not involve expropriations. *Underhill v. Hernandez*, 108 U.S. 250 (1897), involved the detention of a U.S. citizen. This, however, raises the same policy concerns as expropriations. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976), involved the refusal to repay a debt. The Court held that the act of state doctrine did not apply.

227. Restatement (Second) of Foreign Relations Law of the United States § 41 comment b (1965).

228. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 432.

229. See generally Hearings on the Activities of American Multinational Corporations Abroad Before the Subcomm. on International Economic Policy of the House Comm. on International Relations, 94th Cong., 1st Sess. 87-97 (1975) [hereinafter *Hearings on American Multinationals*] (statement of Donald I. Baker, Deputy Assistant to the Att'y Gen., Antitrust Div., Dep't of Justice) (discussing how the Sherman Act might apply to various examples of bribery in foreign commerce).

230. See, e.g., *Associated Radio Serv. Co. v. Page Airways*, 624 F.2d 1342 (5th Cir. 1980), cert. denied, 450 U.S. 1030 (1981); *Rangen, Inc. v. Sterling Nelson & Sons*, 351 F.2d 851 (9th Cir. 1965), cert. denied, 383 U.S. 936 (1966).

231. See, e.g., *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404 (9th Cir. 1983) (per curiam), cert. denied, 464 U.S. 1040 (1984).

232. Cf. *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979) (foreign patents allegedly obtained through fraud).

authorities to take action directly against a foreign competitor.<sup>233</sup>

A number of lower courts have considered whether government procurement decisions raise act of state concerns. In *General Aircraft Corp. v. Air America, Inc.*,<sup>234</sup> the United States District Court for the District of Columbia held that the doctrine bars any suit which requires examining the motives for a foreign government's purchasing decision.<sup>235</sup> Most courts, however, have allowed cases to proceed despite claims of unlawful efforts to influence foreign government procurement. For example, in *Williams v. Curtiss-Wright Corp.*,<sup>236</sup> the plaintiff alleged that the defendant's disparagement and unfair competition had caused it to lose sales of spare parts for military jets to foreign governments.<sup>237</sup> Nevertheless, the United States Court of Appeals for the Third Circuit held that the act of state doctrine did not preclude review.<sup>238</sup> Similarly, in *Sage International, Ltd. v. Cadillac Gage Co.*,<sup>239</sup> the United States District Court for the Eastern District of Michigan held that the act of state doctrine did not prevent judicial consideration of the propriety of sales of armored cars to foreign governments.<sup>240</sup>

Neither *Curtiss-Wright* nor *Sage International* hold that procurement is always, or even normally, outside the reach of the act

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233. See, e.g., *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909) (seizure of plaintiff's plantation); *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976) (enforcement of security interest against property of plaintiff's business). Bribes might also be used to obtain other favorable treatment from government officials, such as relaxed taxation or regulation of the briber's business. This, however, does not directly prejudice competitors.

234. *General Aircraft Corp. v. Air America, Inc.*, 482 F. Supp. 3 (D.D.C. 1979).

235. *Id.* at 7. *General Aircraft Corp.* alleged that the Central Intelligence Agency and various companies connected with it conspired to monopolize the market for short takeoff and landing aircraft. *Id.* at 5. In pursuit of this conspiracy, they purportedly disparaged the plaintiff's airplanes and influenced foreign governments not to purchase from the plaintiff. *Id.* Under these peculiar facts, where the executive branch ostensibly influenced the foreign government procurement decision, it may well be plausible that litigation would embarrass the executive in the conduct of foreign affairs.

236. *Williams v. Curtiss-Wright Corp.*, 694 F.2d 300 (3d Cir. 1982).

237. *Id.* at 302.

238. *Id.* at 304-05 (the doctrine "should not be applied to thwart legitimate American regulatory goals in the absence of a showing that adjudication may hinder international relations").

239. *Sage Int'l, Ltd. v. Cadillac Gage Co.*, 534 F. Supp. 896 (E.D. Mich. 1981).

240. *Id.* at 909. In *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030 (9th Cir.), cert. denied, 464 U.S. 849 (1983), the Ninth Circuit also faced a lawsuit involving foreign government procurement. The plaintiff, however, did not contest whether procurement constituted an act of state. Instead, it argued that the purchasing decisions did not need to be examined and, therefore, the act of state doctrine did not bar the action. *Id.* at 1047. The court accepted this argument for the purpose of denying summary judgment. *Id.* at 1059.

of state doctrine. But, there is a strong argument for this conclusion. As noted above, the FSIA does not confer immunity upon the commercial actions of foreign governments.<sup>241</sup> The FSIA prescribes that the nature of an act, not its purpose, determines whether it is commercial.<sup>242</sup> In this sense, the test is objective. The legislative history of the FSIA indicates that an activity is commercial in nature if it is of the type that a private person might normally engage in for profit.<sup>243</sup> Under this analysis, entering into procurement contracts would be considered commercial since private individuals normally contract to buy goods.<sup>244</sup> This may even go as far as to overrule pre-FSIA cases which held that military procurement, including procurement of non-weapons, was not commercial,<sup>245</sup> since those decisions applied a subjective test focusing upon the purpose for which the government purchased the items.<sup>246</sup>

The fact that procurement should be considered commercial for purposes of sovereign immunity affects the availability of the act of state doctrine as a defense. In *Alfred Dunhill of London, Inc. v. Republic of Cuba*,<sup>247</sup> a plurality of the Supreme Court (joined by four Justices) held that commercial activities are not covered by the doctrine.<sup>248</sup> But, since this holding did not command a major-

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241. See supra note 213 and accompanying text.

242. 28 U.S.C. § 1603(d) (1982).

243. Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Government Relations of the House Comm. on the Judiciary, 94th Cong., 2d Sess. 53 (1976) [hereinafter Hearings on H.R. 11315] (statement of Monroe Leigh, Legal Adviser of the Dep't of State); H.R. Rep. No. 1487, 94th Cong., 2d Sess. 16, reprinted in 1976 U.S. Code Cong. & Admin. News 6604, 6615; see also *United Euram Corp. v. USSR*, 461 F. Supp. 609, 610-11 (S.D.N.Y. 1978) (citing House Judiciary Committee Report which stated that it is the commercial nature of an activity or transaction that is essential). But see *In re Sedco, Inc.*, 543 F. Supp. 561, 565 (S.D. Tex. 1982) (not every act done by a foreign state that could be done by an individual is "commercial activity" for the purposes of the FSIA since "[s]uch a world view unrealistically denies the existence of other types of governments and economic systems"), vacated upon reconsideration of evidence, 610 F. Supp. 306 (S.D. Tex. 1984).

244. *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 309 (2d Cir. 1981), cert. denied, 454 U.S. 1148 (1982); Hearings on H.R. 11315, supra note 243, at 51 (statement of Bruno Ristau, Chief of the Foreign Litig. Sec. of the Civil Div., Dep't of Justice); H.R. Rep. No. 1487, supra note 243, at 16, reprinted in 1976 U.S. Code Cong. & Admin. News at 6615.

245. See, e.g., *Aerotrade, Inc. v. Republic of Haiti*, 376 F. Supp. 1281 (S.D.N.Y. 1974).

246. *National American Corp. v. Federal Republic of Nigeria*, 448 F. Supp. 622, 641 (S.D.N.Y. 1978), aff'd, 597 F.2d 314 (2d Cir. 1979); H.R. Rep. No. 1487, supra note 243, at 16, reprinted in 1976 U.S. Code Cong. & Admin. News at 6615. But cf. *Williams v. Curtiss-Wright Corp.*, 694 F.2d 300 (3d Cir. 1982) (stating that military procurement is not commercial).

247. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976).

248. Justice Stevens joined only the portion of the Court's opinion which found no sover-

ity of the Court, lower courts have been uncertain of the law on this point.<sup>249</sup> Nevertheless, the commercial exception enacted in the FSIA logically compels that a similar exception to the act of state doctrine be recognized. The FSIA embodies an implicit legislative judgment that suits against foreign governments based upon their commercial activities are not detrimental to U.S. foreign policy interests.<sup>250</sup> To dismiss such suits on the ground that they re-

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eign action by Cuba to repudiate the debt at issue. *Id.* at 715 (Stevens, J., concurring). Four justices dissented.

249. The Second and Fifth Circuits have treated the exception as established. This, however, was only in dicta as the courts went on to find it inapplicable to the facts at hand. See *Compania de Gas de Nuevo Laredo v. Entex, Inc.*, 686 F.2d 322, 327 (5th Cir. 1982), cert. denied, 460 U.S. 1041 (1983); *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 73 (2d Cir.), cert. denied, 434 U.S. 984 (1977); see also *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 316 n.38 (2d Cir. 1981) (Nigerian cement procurement did not raise an act of state problem), cert. denied, 454 U.S. 1148 (1982). But see *Braka v. Bancomer, S.N.C.*, 762 F.2d 222, 225 (2d Cir. 1985) (stating that the issue remains open); *Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 594 F.2d 48, 52 (5th Cir. 1979) (same), cert. denied, 445 U.S. 903 (1980). The Third and Sixth Circuits have simply expressed their uncertainty. *Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia*, 729 F.2d 422, 425 n.3 (6th Cir. 1984); *Williams v. Curtiss-Wright Corp.*, 694 F.2d 300, 302 n.2 (3d Cir. 1982). The Ninth Circuit has had the most occasion to address the question. In *International Ass'n of Machinists and Aerospace Workers v. OPEC*, 649 F.2d 1354, 1360 (9th Cir. 1981), cert. denied, 454 U.S. 1163 (1982), the court held that the commercial activity exception to sovereign immunity, which provided jurisdiction to hear the suit against the OPEC member nations for price fixing, did not dilute the act of state doctrine. In *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030 (9th Cir.), cert. denied, 464 U.S. 849 (1983), the court seemed more sympathetic to the exception. It emphasized the distinction suggested in *OPEC* between "seemingly" commercial activities which nevertheless raise act of state concerns and "purely" commercial transactions which ordinarily do not. *Id.* at 1048 n.25. More recently, in *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404, 408 (9th Cir. 1983) (per curiam), cert. denied, 464 U.S. 1040 (1984), the court stated that the issue remained open. While the courts of appeals equivocate, several district courts support the exception. See *Sage Int'l, Ltd. v. Cadillac Gage Co.*, 534 F. Supp. 896, 907 (E.D. Mich. 1981) ("clear trend" toward recognizing exception); *Behring Int'l, Inc. v. Imperial Iranian Air Force*, 475 F. Supp. 396, 401 (D.N.J. 1979); *Dominicus Americana Bohio v. Gulf & Western Indus.*, 473 F. Supp. 680, 689-90 (S.D.N.Y. 1979); *Outboard Marine Corp. v. Pezetel*, 461 F. Supp. 384, 398 (D. Del. 1978) (did not reach issue) (opined that the dissenters in *Dunhill* would have joined the majority if the case had been considered after the passage of the FSIA); *National American Corp. v. Federal Republic of Nigeria*, 448 F. Supp. 622, 639-41 (S.D.N.Y. 1978), aff'd, 597 F.2d 314 (2d Cir. 1979); cf. *MOL, Inc. v. Peoples Republic of Bangladesh*, 572 F. Supp. 79, 85 (D. Or. 1983) (commercial activity exception recognized but interpreted narrowly), aff'd on other grounds, 736 F.2d 1326 (9th Cir.), cert. denied, 469 U.S. 1037 (1984).

250. See Letter from Monroe Leigh, Legal Adviser of the Dep't of State, to the Solicitor General (Nov. 26, 1975), reprinted in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 706 app. 1, at 707 (1976) ("Implicit in [the commercial exception to sovereign immunity] is a determination that adjudications of commercial liability against foreign states do not impede the conduct of foreign relations . . .").



quire review of acts of state contravenes this judgment.<sup>251</sup> It is even more unjustified to preclude actions against private defendants because they involve activities for which the foreign states themselves enjoy no immunity.<sup>252</sup> As a result, notwithstanding *General Aircraft Corp. v. Air America, Inc.*,<sup>253</sup> bribery to influence government procurement should not be beyond judicial review.

Government actions granting access to natural resources pose a more difficult problem. *Clayco Petroleum* held that these activities are not commercial and are encompassed within the act of state defense.<sup>254</sup> The conclusion that these activities are not commercial seems questionable, however, under the objective test created by the FSIA. Private landowners often lease rights to exploit natural resources.<sup>255</sup> Indeed, in *International Association of Machinists and Aerospace Workers v. OPEC*,<sup>256</sup> the Ninth Circuit held that the OPEC cartel engaged in commercial activity for purposes of the FSIA when it fixed the price for oil sold from member nations.<sup>257</sup> It is difficult to understand how selecting a buyer or lessor of natural resources is fundamentally less commercial than fixing

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251. See H.R. Rep. No. 1487, supra note 243, at 20 n.1, reprinted in 1976 U.S. Code Cong. & Admin. News at 6619 n.1; cf. *Outboard Marine Corp. v. Pezetel*, 461 F. Supp. 384, 398 (D. Del. 1978) (dismissing act of state defense in commercial act case in light of FSIA without explicitly recognizing "commercial exception" to the act of state doctrine). But see *International Ass'n of Machinists and Aerospace Workers v. OPEC*, 649 F.2d 1354, 1360 (9th Cir. 1981) (the act of state doctrine is not diluted by the commercial activity exception which limits the doctrine of sovereign immunity), cert. denied, 454 U.S. 1163 (1982).

252. It is true that Congress did not expressly engraft a commercial activity exception onto the act of state doctrine when it passed the FSIA. Nevertheless, no negative implication can be taken from this fact. The legislative history suggests Congress was under the impression that such a step was unnecessary for it thought that the courts had already recognized this exception. H.R. Rep. No. 1487, supra note 243, at 20 n.1, reprinted in 1976 U.S. Code Cong. & Admin. News at 6619 n.1. It is also true that sovereign immunity goes to jurisdiction, while the act of state doctrine raises the issue of justiciability. *International Ass'n of Machinists and Aerospace Workers v. OPEC*, 649 F.2d at 1360 n.8. However, implicit in recognizing jurisdiction over a foreign state's commercial activities must be the assumption that this will not create foreign relations problems sufficient to invoke the act of state defense. Otherwise, granting jurisdiction would be pointless.

253. *General Aircraft Corp. v. Air America, Inc.*, 482 F. Supp. 3 (D.D.C. 1979); see supra notes 234-35 and accompanying text.

254. *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404, 408 (9th Cir. 1983) (per curiam), cert. denied, 464 U.S. 1040 (1984).

255. See Restatement of Foreign Relations Law of the United States (Revised) § 453 comment b (Tent. Draft No. 2, 1981). It may be argued, however, that no private party can lease rights, as in *Clayco Petroleum*, in offshore waters.

256. *International Ass'n of Machinists and Aerospace Workers v. OPEC*, 649 F.2d 1354 (9th Cir. 1981), cert. denied, 454 U.S. 1163 (1982).

257. *Id.* at 1358.

the price for the resources sold.

If providing access to resources is commercial, the above argument suggests that the act of state doctrine should normally not apply. The *OPEC* decision, however, rejected this reasoning.<sup>258</sup> Indeed, both the *OPEC* and *Clayco Petroleum* opinions seem especially deferential toward government actions with respect to natural resources.<sup>259</sup> Nevertheless, the situation in *OPEC* is distinguishable from the normal case involving access to raw materials. Oil is the primary source of wealth for the nations in *OPEC* and possesses a strategic importance which creates significant foreign policy concerns. Absent such unique factors, there is little reason to give commercial acts involving natural resources particular deference.<sup>260</sup>

Even if there is a commercial exception to the act of state doctrine, it will not apply to certain government activities which are uniquely sovereign such as granting monopoly rights or taking steps against the briber's competitor.<sup>261</sup> Nevertheless, not every non-commercial act procured through bribery raises act of state concerns. The presence of such concerns may depend upon a number of factors, including whether the government action is carried out formally,<sup>262</sup> whether the action rises above the ministerial level,<sup>263</sup> and whether any other evidence indicates that the action

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258. *Id.* at 1358-62.

259. See also *In re Sedco, Inc.*, 543 F. Supp. 561, 564-66 (S.D. Tex. 1982) ("commercial activity" exception to FSIA was given a narrow reading in a case involving Mexico's offshore oil exploration), vacated upon reconsideration of evidence, 610 F. Supp. 306 (S.D. Tex. 1984).

260. Compare *Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 594 F.2d 48 (5th Cir. 1979) (act of state doctrine did not preclude litigation of timber cutting concession), cert. denied, 445 U.S. 903 (1980) with *MOL, Inc. v. Republic of Bangladesh*, 572 F. Supp. 79 (D. Or. 1983) (act of state doctrine precluded litigation of rhesus monkey capture and export license), aff'd on other grounds, 736 F.2d 1326 (9th Cir.), cert. denied, 469 U.S. 1037 (1984).

261. See, e.g., *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 73 (2d Cir.) (defendants prevented Libyan oil producer from reaching settlement with Libya, resulting in nationalization of the oil producer), cert. denied, 434 U.S. 984 (1977); *Bokkelen v. Grumman Aerospace Corp.*, 432 F. Supp. 329, 334 (E.D.N.Y. 1977) (denial of importation licenses by Brazilian government is uniquely within its sovereign power and thus judicial inquiry into its reasons is precluded).

262. See *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 695, 706 (1976) (no statute, decree, order, or resolution of the Cuban government was involved; only acts of governmental appointees who had only commercial authority).

263. See *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1293-94 (3d Cir. 1979) (grant of patents); *Forbo-Giubiasco S.A. v. Congoleum Corp.*, 516 F. Supp. 1210, 1217-18 (S.D.N.Y. 1981) (same). But see *Williams v. Curtiss-Wright Corp.*, 694 F.2d 300, 303 (3d Cir. 1982) (emphasis should not be on the ministerial/discretionary dichotomy, but rather the effect on U.S. foreign relations).

carries out a significant policy of the foreign government which, in turn, gives the litigation substantial foreign policy implications.<sup>264</sup> Thus, although influencing a foreign government to expropriate a competitor's facilities raises act of state concerns,<sup>265</sup> persuading a foreign court to foreclose on a competitor's facilities does not.<sup>266</sup>

In addition to considering the nature of the government act obtained by bribery, it is also necessary to explore the impact of bribery itself upon the purposes of the doctrine. Only by extending it beyond its historically recognized form can the doctrine provide any defense for a party who pays off a foreign official. As traditionally formulated, the doctrine precludes challenges to the validity of a foreign government's actions.<sup>267</sup> A claim based upon payoffs need not challenge the validity of the government act; rather, it attacks the legality of the methods used by a private party to procure the decision.<sup>268</sup> In *Hunt v. Mobil Oil Corp.*,<sup>269</sup> however, the Second Circuit held that the act of state doctrine bars more than simply liti-

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264. See *Williams v. Curtiss-Wright Corp.*, 694 F.2d 300, 303 (3d Cir. 1982); *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 607-08 (9th Cir. 1976).

265. See *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909); *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir.), cert. denied, 434 U.S. 984 (1977). If the expropriation violates international law, however, the Hickenlooper Amendment, also called the Sabbatino Amendment, 22 U.S.C. § 2370(e)(2) (1982), may prevent the act of state doctrine from applying.

266. See *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 606-08 (9th Cir. 1976).

267. See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *Underhill v. Hernandez*, 168 U.S. 250 (1897).

268. See *Forbo-Giubiasco S.A. v. Congoleum Corp.*, 516 F. Supp. 1210, 1218 (S.D.N.Y. 1981) ("[W]e are not asked to determine the validity of a foreign patent but to determine whether the foreign patents were obtained through inequitable conduct."). In *Sharon v. Time, Inc.*, 599 F. Supp. 538 (S.D.N.Y. 1984), the court held that the act of state doctrine did not apply because there was no challenge to the validity of any officially authorized public act. *Id.* at 544. The parties agreed that the alleged condoning of a civilian massacre would be illegal under Israeli law. *Id.* at 546.

269. *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir.), cert. denied, 434 U.S. 984 (1977). See also *General Aircraft Corp. v. Air America, Inc.*, 482 F. Supp. 3, 7 (D.D.C. 1979) (court unable to address the issue of motivation underlying purchasing decisions though conspiracy may be involved); *Bokkelen v. Grumman Aerospace Corp.*, 432 F. Supp. 329, 333 (E.D.N.Y. 1977) (court precluded from inquiring into the reason for denial of importation licenses); *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92, 111 (C.D. Cal. 1971) (doctrine bars claim for antitrust injury flowing from foreign sovereign acts allegedly induced and procured by defendant), *aff'd per curiam*, 461 F.2d 1261 (9th Cir.), cert. denied, 409 U.S. 950 (1972). But see *Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 594 F.2d 48, 53-54 (5th Cir. 1979) (since neither the validity of regulations nor the legality of behavior of Indonesia was in question, antitrust action was held justiciable), cert. denied, 445 U.S. 903 (1980).

gation over the validity of a foreign state's conduct; it also precludes suits which require examining the motivation for the conduct. As recognized in *Clayco Petroleum*, this brings an official bribery claim directly within the rule, since the plaintiff must show that the payment motivated the government action in order to establish a causal connection between the bribe and the plaintiff's injury.

The *Hunt/Clayco Petroleum* line of reasoning has several flaws. First, it is difficult to reconcile with Supreme Court decisions. In each of the cases where the Court applied the act of state doctrine, the plaintiff had challenged the validity of the government action.<sup>270</sup> But, in a case where only motivation was at issue, there was hardly a consideration of the defense.<sup>271</sup> In *United States v. Sisal Sales Corp.*,<sup>272</sup> the Justice Department alleged that the defendants had persuaded the Mexican and Yucatan governments to pass discriminatory legislation which forced other buyers of sisal out of the market.<sup>273</sup> Yet, the Court upheld the complaint.<sup>274</sup> Similarly, in *Continental Ore Co. v. Union Carbide & Carbon Corp.*,<sup>275</sup> the Court distinguished between challenging the validity of a foreign government's conduct, which it noted the plaintiff did not do, and challenging efforts to influence government action against a competitor.<sup>276</sup>

It is also questionable whether the policy behind the act of state doctrine should preclude examining whether an illegal payment motivated the action of a foreign official. The *Clayco Petroleum* opinion correctly notes that inquiry into charges of corruption can

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270. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937); *Ricaud v. American Metal Co.*, 246 U.S. 304 (1918); *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918); *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909); *Underhill v. Hernandez*, 168 U.S. 250 (1897); cf. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976) (plaintiff challenged an informal commercial act of the Cuban government).

271. More recently, in *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 634 n.28 (1983), the Court refused to consider whether the act of state doctrine precluded examining motives as well as validity.

272. *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927).

273. This allegation was central to establishing causality in the Justice Department's case. If the defendants did not induce the objectionable legislation, it is difficult to understand how they could be liable for the resulting monopoly.

274. *United States v. Sisal Sales Corp.*, 274 U.S. at 276.

275. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962).

276. *Id.* at 706.



lead to embarrassment.<sup>277</sup> The court, however, confuses embarrassment of the official charged with taking a bribe with consternation of a foreign government and, in turn, confuses possible discomfort of a foreign government with infringement of the exclusive power of the executive branch in the conduct of foreign policy. In cases such as *Banco Nacional de Cuba v. Sabbatino*,<sup>278</sup> the Supreme Court was concerned about the embarrassment of the executive when the nation speaks with more than one voice on an issue under negotiation with a foreign state. There is no similar concern in a case involving foreign bribery unless the executive branch encouraged the foreign official to take bribes. Moreover, any resentment toward the United States by an official charged with corruption could as easily result from accusations printed in the *New York Times*—which will probably have greater exposure—as from claims heard in private litigation. Nevertheless, U.S. foreign policy manages to survive a free press.<sup>279</sup>

Even if issues of motivation do invoke the act of state doctrine, its application still depends upon the nature of the government act in question. For example, in denying immunity for commercial activity, the FSIA permits litigation directly with the foreign sovereign which may call for an examination of its motives.<sup>280</sup> This sug-

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277. *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404, 407 (9th Cir. 1983) (per curiam), cert. denied, 464 U.S. 1040 (1984).

278. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). *Sabbatino* constitutes the leading case on the act of state doctrine. It is the only recent decision regarding the subject where a majority of the Supreme Court agreed on one opinion. The Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2) (1982), however, overrules *Sabbatino* on its precise issue by precluding the application of the act of state doctrine if international law has been violated. *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92, 111-12 (C.D. Cal. 1971), aff'd per curiam, 461 F.2d 1261 (9th Cir.), cert. denied, 409 U.S. 950 (1972). The Hickenlooper Amendment has been narrowly interpreted to preserve the bulk of the *Sabbatino* reasoning. *Id.* at 112.

279. It is difficult to see how much more embarrassment would have occurred in *Clayco Petroleum* given the public disclosure already made by Occidental. Moreover, in *Associated Radio Serv. Co. v. Page Airways*, 624 F.2d 1342 (5th Cir. 1980), cert. denied, 450 U.S. 1030 (1981), the plaintiff proved foreign corruption at trial and the defendant evidently neglected to raise the act of state defense. Yet, contrary to provoking any outcry abroad, the case passed virtually unnoticed. The litigation in *Sharon v. Time, Inc.*, 599 F. Supp. 538 (S.D.N.Y. 1984), was anything but unnoticed. The district court, however, rejected the argument that embarrassment of a friendly government required applying the act of state doctrine. *Id.* at 552-53. Relations between the United States and Israel successfully weathered this suit.

280. See, e.g., *Sage Int'l, Ltd. v. Cadillac Gage Co.*, 534 F. Supp. 896, 907-08 (E.D. Mich. 1981). For example, a breach of contract suit against a foreign government may raise the issue of whether it acted in good faith. Cf. U.C.C. §§ 1-201(19), 1-203 (1977) (there is an

gests that Congress was not overly concerned with embarrassing foreign officials by allowing courts to inquire into the motives for their commercial acts even if such an inquiry is inappropriate for their uniquely sovereign conduct. Similarly, the mere presence of bribery, and resulting possible embarrassment, should not create an act of state barrier when the government act is carried out on a relatively low level or is ministerial in nature. In *Timberlane Lumber Co. v. Bank of America*,<sup>281</sup> for example, the Ninth Circuit held that a judicial foreclosure by the Honduran courts did not raise act of state concerns despite allegations that the defendants had paid off Honduran officials.<sup>282</sup>

Whether issues of motivation otherwise raise act of state concerns, some courts suggest that corruption creates an exception to the doctrine. Curiously, this notion also had its genesis in *Hunt v. Mobil Oil Corp.*<sup>283</sup> There, the Second Circuit noted concerns raised by the lower court regarding the impact of bribery upon the act of state defense.<sup>284</sup> The opinion, however, did not directly address these concerns because the plaintiff had made no allegation of payoffs. Since *Hunt*, two United States district courts have expressed support for a corruption exception,<sup>285</sup> but the Ninth Circuit rejected it in *Clayco Petroleum*.<sup>286</sup>

Three arguments may be advanced in support of a corruption exception. First, it may be argued that the act of a bribed government official is not an act of a foreign government. The Supreme Court's opinion in *Continental Ore Co. v. Union Carbide & Carbon Corp.*<sup>287</sup> supports this argument. In *Continental Ore*, the Ca-

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obligation of good faith and fair dealing in every contract or duty and is defined as honesty in fact in the conduct or transaction concerned).

281. *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976).

282. *Id.* at 608.

283. *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir.), cert. denied, 434 U.S. 984 (1977).

284. *Id.* at 79.

285. In *Dominicus Americana Bohio v. Gulf & Western Indus.*, 473 F. Supp. 680, 690 (S.D.N.Y. 1978), the court held, in the alternative, that charges that the defendant had procured favorable actions through corruption and intimidation precluded use of the act of state doctrine as a defense. The court in *Sage Int'l, Ltd. v. Cadillac Gage Co.*, 534 F. Supp. 896, 908 (E.D. Mich. 1981), did not read the plaintiff's complaint as making similar allegations. It noted, however, that such claims would likely preclude use of the doctrine. *Id.*

286. *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404, 409 (9th Cir. 1983) (per curiam), cert. denied, 464 U.S. 1040 (1984). The Fifth Circuit in *Compania de Gas de Nuevo Laredo v. Entex, Inc.*, 686 F.2d 322, 326 (5th Cir. 1982), cert. denied, 460 U.S. 1041 (1983), declined to address whether a corruption exception exists.

287. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962).

nadian government appointed a wholly-owned subsidiary of Union Carbide to purchase and allocate all vanadium for Canadian industry during the Second World War.<sup>288</sup> Continental Ore charged that the Union Carbide subsidiary had refused to purchase vanadium from it as part of a conspiracy to eliminate Continental Ore from the market.<sup>289</sup> In holding that Union Carbide and the other defendants could be held liable for conspiring to boycott Continental Ore, the Court indicated that there was no evidence that the Canadian government approved the appointed company's act.<sup>290</sup> Similarly, it may be safely presumed that foreign governments do not condone their officials taking bribes. Hence the official's corrupt conduct should not be attributed to the government.<sup>291</sup>

The universal condemnation of bribery<sup>292</sup> provides a second basis for a corruption exception. The Supreme Court in *Sabbatino* noted that diverging views between nations regarding appropriate standards of conduct make judicial abstention particularly appropriate.<sup>293</sup> Such divergence is especially apparent on subjects such as nationalization, as in *Sabbatino*, and cartel activities, as in *OPEC*. This reflects the fundamental difference in economic philosophy between nations following a free market approach and those favoring state control of industry.<sup>294</sup> The lack of international consensus renders these subjects more suited to negotiation through the executive branch than litigation in the courts. In contrast, there is no lack of consensus as to the illegality of bribing government officials which would otherwise render diplomatic negotiations a superior forum for resolving a defeated competitor's complaint.<sup>295</sup>

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288. *Id.* at 695.

289. *Id.*

290. *Id.* at 706. Cf. *Filartiga v. Peña-Irala*, 630 F.2d 876, 889 (2d Cir. 1980) ("[W]e doubt whether action by a state official [who kidnapped and tortured to death the plaintiff's son] in violation of the Constitution and laws of the Republic of Paraguay, and wholly unratified by that government, could properly be characterized as an act of state."); *Sharon v. Time, Inc.*, 599 F. Supp. 538, 544 (S.D.N.Y. 1984) (defendant specifically alleged that Sharon went beyond his authority as representative of Israel).

291. See *Jimenez v. Aristequieta*, 311 F.2d 547, 557-58 (5th Cir. 1962), cert. denied, 373 U.S. 914 (1963); *Hearings on American Multinationals*, supra note 229, at 91 (statement of Ronald I. Baker). This presumption should not involve the court in any difficult assessment concerning the validity of official acts under local regulations. Cf. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 415 n.17 (1964) (noting justiciability problems in determining validity of a foreign government's acts).

292. See supra note 4.

293. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 430.

294. *Id.*

295. *McManis*, supra note 3, at 238; cf. *Filartiga v. Peña-Irala*, 630 F.2d 876, 884 (2d Cir.

Finally, in *Sage International, Ltd. v. Cadillac Gage Co.*,<sup>296</sup> the district court suggested that the passage of the FCPA implicitly mandated the recognition of a corruption exception.<sup>297</sup> Indeed, it would hardly make sense for Congress to pass a law criminalizing bribery of foreign officials if the act of state doctrine precluded prosecutions.<sup>298</sup> The Ninth Circuit rejected this reasoning in *Clayco Petroleum*, finding an essential difference between private actions brought under the antitrust laws and government prosecutions brought under the FCPA.<sup>299</sup> It noted that private actions lack the check provided by prosecutorial discretion against bringing an action which might harm U.S. foreign policy interests.<sup>300</sup>

There are several problems with this distinction. First, the legislative history provides some support for an implied private cause of action under the FCPA.<sup>301</sup> This fact is inconsistent with the notion that Congress relied on prosecutorial discretion to cure act of state concerns when it passed the FCPA. Moreover, the Ninth Circuit's reasoning takes an overly cynical view of Congress' intent. Congress was undoubtedly aware that prosecutorial discretion would exist in bringing actions under the FCPA. In some cases, the Justice Department or SEC might exercise this discretion with an eye to foreign policy. There is no support in the legislative history, however, for any claim that Congress passed the FCPA expecting enforcement only when the State Department lacked concern about offending foreign officials and their governments. Indeed, SEC activities prior to the enactment of the FCPA hardly showed great sensitivity to preventing embarrassment of high officials of friendly nations.<sup>302</sup> Congress was aware of the SEC's record in this

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1980) (international consensus that torture is prohibited); *Sharon v. Time, Inc.*, 599 F. Supp. 538, 546 (S.D.N.Y. 1984) (consensus that condoning civilian massacre would be illegal under Israeli or international law).

296. *Sage Int'l, Ltd. v. Cadillac Gage Co.*, 534 F. Supp. 896 (E.D. Mich. 1981).

297. *Id.* at 910 n.26.

298. Prosecution of foreign bribers under the antitrust laws actually presents less potential for embarrassing U.S. interests than exposing bribery by U.S. citizens under the FCPA.

299. *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404, 409 (9th Cir. 1983) (per curiam), cert. denied, 464 U.S. 1040 (1984).

300. *Id.*

301. See, e.g., H.R. Rep. No. 640, 95th Cong., 1st Sess. 10 (1977). But see 123 Cong. Rec. 38,602 (Dec. 6, 1977) (remarks of Sen. Tower) ("[It is] my understanding that neither the Senate nor the conferees expressed any opinion on this issue.").

302. See Herlihy & Levine, *supra* note 3, at 590-94.



area and chose it as one of the two agencies charged with enforcing the FCPA.<sup>303</sup>

### C. *Sovereign Compulsion*

Sovereign compulsion provides another possible defense for bribers of foreign officials. A number of courts have suggested that the antitrust laws do not proscribe actions which a foreign government compels the defendant to perform.<sup>304</sup> Accordingly, a briber might argue that the payment was not made voluntarily, but rather was extorted by a corrupt official. This is much like the defense sometimes asserted under domestic criminal law in response to a charge of bribery.<sup>305</sup> In addition to the obvious evidentiary problems, there are several flaws in this defense.

First, it is questionable whether illegal efforts to extort a bribe meet the prerequisites for the sovereign compulsion defense. The defense is available when an individual is "required by law" to per-

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303. See 15 U.S.C. § 78u(d) (1982) (conduct declared unlawful by FCPA); 15 U.S.C. § 78dd-1 (1982) (SEC enforcement power). In *Sage Int'l, Ltd. v. Cadillac Gage Co.*, 534 F. Supp. 896 (E.D. Mich. 1981), the defendants argued that the FCPA did not require examining the actions of foreign officials since it prohibited offers of bribes even if not accepted. *Id.* at 910 n.26. The district court rejected this argument. It noted that a trial under the FCPA might still explore a foreign official's motivation in order to determine whether the offer had any chance of success. *Id.* More significantly, the FCPA prohibits both offers and payments. 15 U.S.C. §§ 78dd-1(a), 78dd-2(b) (1982). Thus, prosecutors can and have brought actions which allege that defendants influenced foreign officials. See, e.g., *United States v. Kenny*, Civil No. 79-2038 (D.D.C. filed Aug. 2, 1979) (illegal campaign contributions exchanged for promise of extending Cook Island postage stamp distribution contract); *United States v. Carver*, Civil No. 79-1768 (S.D. Fla. filed May 1, 1979) (bribed oil director of Qatar to obtain oil concession).

304. See, e.g., *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707 (1962); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1293 (3d Cir. 1979); *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 606 (9th Cir. 1976); *United States v. Watchmakers of Switzerland Information Center*, 1963 Trade Cas. (CCH) ¶ 70,600, at 77,457 (S.D.N.Y. 1962), order modified, 1965 Trade Cas. (CCH) ¶ 71,352 (S.D.N.Y. 1965). But see *Sabre Shipping Corp. v. American President Lines, Ltd.*, 285 F. Supp. 949, 954 (S.D.N.Y. 1968) (acts done at direction of Japanese government are not insulated from prosecution or civil responsibility when done in U.S. commerce), *aff'd sub nom. Japan Line, Ltd. v. Sabre Shipping Corp.*, 407 F.2d 173 (2d Cir.), cert. denied, 395 U.S. 922 (1969). Only once, however, did a court actually sustain this defense on the facts before it. See *Interamerican Ref. Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D. Del. 1970) (defendants refused to sell Venezuelan crude oil to plaintiff's refinery on orders from the Venezuelan government).

305. See, e.g., *United States v. McPartlin*, 595 F.2d 1321, 1338-42 (7th Cir.), cert. denied, 444 U.S. 833 (1979); *United States v. Peskin*, 527 F.2d 71, 82-84 (7th Cir. 1975), cert. denied, 429 U.S. 818 (1976); *United States v. Kahn*, 472 F.2d 272, 277-79 (2d Cir.), cert. denied, 411 U.S. 982 (1973); *United States v. Barash*, 365 F.2d 395, 401-02 (2d Cir. 1966).

form the act in question.<sup>306</sup> Obviously, no one is required by law to bribe government officials. Moreover, the Justice Department contends that the defense is available only when the order of compulsion is lawful in the country where made.<sup>307</sup> This would not be the case when a foreign official extorts a bribe.

Unfortunately, the only court to confront this issue contradicts the Justice Department's view. In *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*,<sup>308</sup> the United States District Court for the District of Delaware accepted the compulsion defense despite the plaintiff's contention that the Venezuelan government orders instructing the defendants to boycott it were invalid under Venezuelan law.<sup>309</sup> The court stated that the act of state doctrine precluded it from passing on the validity of the orders.<sup>310</sup> Without challenging the court's decision on the facts before it, the claim of technical invalidity in *Interamerican Refining* is distinguishable from the blatant illegality of extorting a bribe. A court need not explore the formal prerequisites for official action under foreign law—an in-

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306. Restatement of Foreign Relations Law of the United States (Revised) § 419(1)(b) (Tent. Draft No. 3, 1982).

307. U.S. Dep't of Justice, Antitrust Div., Antitrust Guide for International Operations 52, 55 (1977). In addition, the Justice Department apparently considers the defense unavailable if the foreign government acts in a commercial rather than public capacity when imposing the compulsion. *Id.* at 55. If accepted by the courts, this distinction would preclude the sovereign compulsion excuse in cases involving procurement contracts and access to resources.

308. *Interamerican Ref. Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D. Del. 1970).

309. *Id.* at 1298. This claim was based upon the fact that the government orders were not in writing or published in the official gazette. *Id.* In *Associated Radio Serv. Co. v. Page Airways*, 624 F.2d 1342 (5th Cir. 1980), cert. denied, 450 U.S. 1030 (1981), the court approved the following jury instruction:

However, before you may consider this as evidence of any or all of the foregoing antitrust violations you must find: (1) This foreign commercial bribery is not an accepted industry practice in the foreign market and is not illegal under the law of that foreign country which defendants must prove to you by a preponderance of the evidence and (2) it was not compelled by a foreign government official which defendants must prove by a preponderance of the evidence. By "compelled" I mean that the "foreign bribe" is a cost of doing business in the particular country and failure to make the payments results in the competitor inevitably losing the business.

*Id.* at 1360 n.27. The jury found for the plaintiff, however, and thus the court of appeals did not specifically consider whether this instruction was too generous to the defendant.

310. *Interamerican Ref. Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. at 1298-99. *Interamerican Refining* also appears to contradict the Justice Department's view regarding compulsion by a foreign government acting in a commercial capacity. The court upheld the defense despite the fact the orders involved the sale of oil. *Id.*

quiry which admittedly raises justiciability problems<sup>311</sup>—to determine that a government official lacks authority to commit extortion.

The policies behind the sovereign compulsion defense apply imperfectly, if at all, to extortion of a bribe. Three concerns underlie the defense: the problem of comity raised when two nations attempt to compel contradictory conduct, the unfairness to a defendant caught in the middle, and the possibility that compelling compliance with U.S. antitrust laws at the cost of disobeying foreign law could eliminate rather than enhance competition.<sup>312</sup> Comity, however, does not require deference to the action of a foreign official which is clearly in violation of his own law. Indeed, the opposite approach may better serve the interests of comity. In addition, there is no unfairness to the defendant or loss of competition if the company could have exposed the extortion to higher authority. Thus, only when resistance to the demand is completely impossible should the courts even consider a sovereign compulsion defense based upon extortion.

Assuming that the courts recognize a compulsion defense when the defendant could not challenge the extortionate demand, the defense should still not apply when the bribe prejudices competitors. In order for the defense to apply, there must be an adequate degree of compulsion.<sup>313</sup> A finding of adequate compulsion depends upon three interrelated factors. The first is the extent to which the extortion truly springs from the government official's unilateral demand rather than the defendant's suggestion. Courts repeatedly hold that the defense is unavailable if the defendant procured the order.<sup>314</sup> The next factor is the degree of insistence with which the official makes the demand. Courts distinguish between mere ap-

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311. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 415 n.17 (1964).

312. 1 J. Atwood & K. Brewster, *supra* note 137, § 8.18, at 265-66; see also *Interamerican Ref. Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. at 1298 (holding that anticompetitive practices compelled by foreign nations are not restraints of commerce, as the term is understood in the Sherman Act, because refusal to comply would put an end to commerce).

313. See, e.g., *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1293 (3d Cir. 1979); *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 606-07 (9th Cir. 1976).

314. See, e.g., *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1293 (3d Cir. 1979); *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 606-07 (9th Cir. 1976); *Interamerican Ref. Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1297 (D. Del. 1970); *United Nuclear Corp. v. General Atomic Co.*, 96 N.M. 155, 186-87, 629 P.2d 231, 262-63 (1980), appeal dismissed, 451 U.S. 901 (1981); cf. *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 592-93 (1976) (in the federal/state context, the compulsion defense depends upon proof that the state's command was in no way conditioned by "private" conduct).

proval, or even requests, and actual requirements imposed upon the defendant.<sup>315</sup> The final factor is the penalty for non-compliance. The Restatement of Foreign Relations Law of the United States (Revised) takes the position that the defense is only available when criminal or other severe sanctions accompany the requirement.<sup>316</sup> Such sanctions include the termination of valuable business arrangements, but not, according to the Restatement, denying the opportunity for new arrangements.<sup>317</sup>

Combining these factors, the defendant might prove adequate compulsion when, for example, it paid the bribe in response to threats of action against its business, such as expropriation or other harassment. In these situations, however, the payoff does not prejudice competitors. On the other hand, when the defendant uses the bribe to gain a competitive advantage—*e.g.*, when an official indicates that a government contract, access to resources, or regulation which handicaps a competitor might be available for a

315. See, *e.g.*, *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 706-07 (1962); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1293 (3d Cir. 1979); *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 606-07 (9th Cir. 1976); *United States v. Watchmakers of Switzerland Information Center*, 1963 Trade Cas. (CCH) ¶ 70,600, at 77,456-57 (S.D.N.Y. 1962), order modified, 1965 Trade Cas. (CCH) ¶ 71,352 (S.D.N.Y. 1965). But see *United States v. Standard Oil Co. (N.J.)*, 1969 Trade Cas. (CCH) ¶ 72,742, at 86,647-48 (S.D.N.Y. 1969) (consent decree did not apply to conspiratorial business acts done in pursuit of foreign power's "request or official pronouncement of policy" if non-compliance would result in loss of business).

316. Restatement of Foreign Relations Law of the United States (Revised) § 419 comment c (Tent. Draft No. 3, 1982).

317. *Id.* In support of this principle, reporter's note 3 cites *United States v. First Nat'l City Bank*, 396 F.2d 897 (2d Cir. 1968). Here, the Second Circuit held that the bank's refusal to produce subpoenaed documents located at its branch in West Germany could be justified by criminal or non-criminal sanctions imposed by West German law, including loss of the bank's license. *Id.* at 901-02. The court held that loss of customers, however, was an insufficient excuse. *Id.* at 904. Other courts have been less demanding. In *Associated Radio Serv. Co. v. Page Airways*, 624 F.2d 1342 (5th Cir. 1980), cert. denied, 450 U.S. 1030 (1981), the court of appeals approved a more lenient jury instruction. See *supra* note 309 (quotation of instruction). In *United States v. Standard Oil Co. (N.J.)*, 1969 Trade Cas. (CCH) ¶ 72,742 (S.D.N.Y. 1969), a consent decree exempted acts

[w]here the combination . . . is participated in by Jersey pursuant to request or official pronouncement of policy of the foreign nation or nations within which the transactions which are the subject of such combination take place, or of any supranational authority having jurisdiction over such transactions within such nation or nations, and where failure to comply with which request or policy would expose Jersey to the risk of the present or future loss of the particular business in such foreign nation or nations which is the subject of such request or policy.

*Id.* at 86,648. Neither of these two courts, however, squarely faced the issue. The plaintiff prevailed in the former case and the latter suit involved a consent judgment.



price—the defendant should not be able to show adequate compulsion. This is particularly true under the Restatement criteria where loss of new business is not a sufficient penalty.

These distinctions are consistent with domestic criminal law and the FCPA. Under the leading federal cases, a claim that a United States or local official extorted the payment is not a defense to a bribery prosecution unless the pressure exerted is so overpowering as to negate the willful intent necessary for conviction.<sup>318</sup> This means that the official must threaten serious economic harm,<sup>319</sup> the briber must be unable to report the demand to higher authority,<sup>320</sup> and the economic harm must involve deprivation of something to which the defendant is entitled rather than denial of discretionary action.<sup>321</sup> Under these criteria, particularly the last, loss of a prospective contract does not provide the basis for an extortion defense. The legislative history of the FCPA draws a parallel distinction for determining when extortion negates the required element that the U.S. company "corruptly" make the payment to a foreign official.<sup>322</sup> As a result, in any situation where the compulsion defense exists for a foreign business, U.S. nationals are also free to make the payment without violating the FCPA. Conversely, if the FCPA prohibits a U.S. firm from paying an official, the compulsion defense should not apply.

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318. See, e.g., *United States v. Kahn*, 472 F.2d 272, 278 (2d Cir.), cert. denied, 411 U.S. 982 (1973); *United States v. Barash*, 365 F.2d 395, 401-02 (2d Cir. 1966). But compare *United States v. Colacurcio*, 659 F.2d 684, 690 (5th Cir. 1981) (refused to recognize any extortion defense), cert. denied, 455 U.S. 1002 (1982) and N.Y. Penal Law § 200.05 (McKinney 1975) (extortion is an absolute defense).

319. See, e.g., *United States v. McPartlin*, 595 F.2d 1321, 1339-40 (7th Cir.), cert. denied, 444 U.S. 833 (1979); *United States v. Barash*, 365 F.2d 395, 401-02 (2d Cir. 1966), cert. denied, 396 U.S. 832 (1969).

320. See, e.g., *United States v. Bertman*, 686 F.2d 772, 775 (9th Cir. 1982); *United States v. McPartlin*, 595 F.2d 1321, 1339 (7th Cir.), cert. denied, 444 U.S. 833 (1979).

321. See, e.g., *United States v. McPartlin*, 595 F.2d 1321, 1339-40 (7th Cir.), cert. denied, 444 U.S. 833 (1979); *United States v. Peskin*, 527 F.2d 71, 84 (7th Cir. 1975), cert. denied, 429 U.S. 818 (1976).

322. That the payment may have been first proposed by the recipient rather than the U.S. company does not alter the corrupt purpose on the part of the person paying the bribe. On the other hand true extortion situations would not be covered by this provision since a payment to an official to keep an oil rig from being dynamited should not be held to be made with the requisite corrupt purpose.

S. Rep. No. 114, 95th Cong., 1st Sess. 10-11, reprinted in 1977 U.S. Code Cong. & Admin. News 4098, 4108.

### D. *The Noerr-Pennington Doctrine*

As a last resort, a defendant may invoke the *Noerr-Pennington* doctrine. This doctrine was named for two Supreme Court decisions which held that solicitation of government action, even if intended to restrain or eliminate competition, is normally not a violation of the Sherman Act.<sup>323</sup> The twin bases for the doctrine are the desire to preserve a free flow of information to representatives in a democracy and to avoid chilling first amendment rights.<sup>324</sup> There are several reasons why the rule should not apply to bribery of foreign officials.

First, it is questionable whether the rule applies to the solicitation of foreign governments. Supreme Court decisions have equivocated on this issue<sup>325</sup> and lower courts are split.<sup>326</sup> The first amendment rationale, however, does not apply overseas.<sup>327</sup> Providing

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323. *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961).

324. See, e.g., *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972); *Eastern R.R. Presidents Conf. v. Noerr Motor Freight*, 365 U.S. at 137-38.

325. In *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927), the Justice Department alleged that the defendants gained a monopoly over sisal imports in large part by lobbying the Mexican and Yucatan governments to pass discriminatory legislation. *Id.* at 273-74. Nevertheless, the Supreme Court upheld the complaint. *Id.* at 276. It must be noted, however, that *Sisal Sales Corp.* substantially preceded the *Noerr* decision. In *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707-08 (1962), the Supreme Court found *Noerr* inapplicable because the defendants did not solicit Canadian government legislation. This suggests that the doctrine might have been applicable if they had. Graziano, *Foreign Governmental Compulsion as a Defense in United States Antitrust Law*, 7 Va. J. Int'l L. 100, 132 (1967).

326. Compare *Laker Airways v. Pan American World Airways*, 604 F. Supp. 280, 287 (D.D.C. 1984) (dicta stating doctrine does not apply to the petitioning of foreign governments); *Bulkferts Inc. v. Salatin Inc.*, 574 F. Supp. 6, 9 (S.D.N.Y. 1983) (same); *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92, 107-08 (C.D. Cal. 1971) (same), *aff'd per curiam* on other grounds, 461 F.2d 1261 (9th Cir.), cert. denied, 409 U.S. 950 (1972) with *Coastal States Mktg. v. Hunt*, 694 F.2d 1358, 1366 (5th Cir. 1983) (petitioning immunity applied to litigation brought in foreign courts); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 513 F. Supp. 1100, 1157 (E.D. Pa. 1981) (applying *Noerr* to lobbying United States and Japanese governments without discussion of foreign government issue), *aff'd* in part and *rev'd* in part on other grounds sub nom. *In re Japanese Electronic Prods. Antitrust Litig.*, 723 F.2d 238 (3d Cir. 1983), *rev'd* on other grounds sub nom. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348 (1986); see also *Associated Container Transp. (Austl.) Ltd. v. United States*, 705 F.2d 53, 60 n.10 (3d Cir. 1983) (left issue open); *Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 671 F.2d 876, 882 n.6 (5th Cir. 1982) (same), vacated, 460 U.S. 1007, *reaff'd per curiam* on remand, 704 F.2d 785 (5th Cir.), cert. denied, 464 U.S. 961 (1983); *Dominicus Americana Bohio v. Gulf & Western Indus.*, 473 F. Supp. 680, 690 n.3 (S.D.N.Y. 1979) (same).

327. *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92, 108 (C.D. Cal. 1971), *aff'd per curiam* on other grounds, 461 F.2d 1261 (9th Cir.), cert. denied, 409 U.S. 950

information to representatives in a democracy is also irrelevant to many foreign regimes. Even if the doctrine applies abroad, it is uncertain whether it covers solicitation of commercial acts, such as a government procurement contract.<sup>328</sup> Again, with conflicting guidance from the Supreme Court,<sup>329</sup> lower courts are divided.<sup>330</sup> When a government entity acts as a consumer, however, there is little reason to treat a defendant differently simply because it transacts business with such an entity rather than a private party. Moreover, bribery of government officials falls within the "sham" exception

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(1972).

328. *Id.*

329. In *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), the Supreme Court held the doctrine inapplicable because "[i]n this case, respondents' conduct is wholly dissimilar to that of the defendants in *Noerr*. Respondents were engaged in private commercial activity, no element of which involved seeking to procure the passage or enforcement of laws." *Id.* at 707. In *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), however, the defendants solicited the Secretary of Labor to establish a minimum wage for companies selling coal to the Tennessee Valley Authority (TVA). *Id.* at 660. They also lobbied the TVA to curtail spot market purchases. Such purchases were exempt from the minimum wage requirement. *Id.* at 660-61. Thus, although these lobbying efforts were aimed at influencing governmental commercial acts of procurement, they were immunized from anti-trust claims by the *Noerr* doctrine. *Id.* at 670. However, the efforts involved promoting a legislative policy decision of encouraging a minimum wage rather than simply choosing one supplier over another. See *George R. Whitten, Jr., Inc. v. Paddock Pool Builders*, 424 F.2d 25, 31-33 (1st Cir.) (distinguishing *Noerr-Pennington* from merchants' efforts to influence the purchasing decisions of public officials acting under competitive bidding statutes), cert. denied, 400 U.S. 850 (1970).

330. Decisions holding or suggesting that the doctrine is inapplicable to commercial acts include *Coastal States Mktg. v. Hunt*, 694 F.2d 1358, 1365 (5th Cir. 1983); *Federal Prescription Serv. v. American Pharmaceutical Ass'n*, 663 F.2d 253, 263 (D.C. Cir. 1981), cert. denied, 455 U.S. 928 (1982); *Corey v. Look*, 641 F.2d 32, 36 (1st Cir. 1981); *Kurek v. Pleasure Driveway & Park Dist.*, 557 F.2d 580, 592 n.10 (7th Cir. 1977), vacated, 435 U.S. 992, reinstated per curiam, 583 F.2d 378 (7th Cir. 1978), cert. denied, 439 U.S. 1090 (1979); *Hecht v. Pro-Football, Inc.*, 444 F.2d 931, 941 (D.C. Cir. 1971), cert. denied, 404 U.S. 1047 (1972); *Sacramento Coca-Cola Bottling Co. v. Chauffeurs, Teamsters & Helpers Local No. 150*, 440 F.2d 1096, 1099 (9th Cir.), cert. denied, 404 U.S. 826 (1971); *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286, 1296-98 (5th Cir. 1971), cert. denied, 404 U.S. 1047 (1972); *George R. Whitten, Jr., Inc. v. Paddock Pool Builders*, 424 F.2d 25, 33 (1st Cir.), cert. denied, 400 U.S. 850 (1970); *City of Atlanta v. Ashland-Warren, Inc.*, 1982-1 Trade Cas. (CCH) ¶ 64,527, at 72,928 (N.D. Ga. 1981); *General Aircraft Corp. v. Air America, Inc.*, 482 F. Supp. 3, 8 (D.D.C. 1979); *Oahu Gas Serv. v. Pacific Resources, Inc.*, 460 F. Supp. 1359, 1384-85 (D. Hawaii 1978).

Contrary decisions include *Greenwood Utils. Comm'n v. Mississippi Power Co.*, 751 F.2d 1484, 1505 (5th Cir. 1985); *In re Airport Car Rental Antitrust Litig.*, 693 F.2d 84, 87-88 (9th Cir. 1982), cert. denied, 462 U.S. 1133 (1983); *Household Goods Carriers' Bureau v. Terrell*, 452 F.2d 152, 158-59 (5th Cir. 1971); *BusTop Shelters, Inc. v. Convenience & Safety Corp.*, 521 F. Supp. 989, 996 n.9 (S.D.N.Y. 1981); *Reaemco, Inc. v. Allegheny Airlines*, 496 F. Supp. 546, 556 n.6 (S.D.N.Y. 1980); *United States v. Johns-Manville Corp.*, 245 F. Supp. 74, 81-82 (E.D. Pa. 1965).

to the *Noerr-Pennington* doctrine. This exception excludes from coverage activities which do not fit the two purposes of the rule.<sup>331</sup> Courts have repeatedly stated that bribery is such an activity.<sup>332</sup>

## V. CONCLUSION

This Article has endeavored to provide a roadmap for prosecuting foreign companies committing bribery overseas to the prejudice of U.S. firms. Substantial authority indicates that overseas bribery to gain a competitive advantage can violate U.S. antitrust laws. The United States may prosecute these illegal activities, even when committed abroad by a foreign firm, when United States can gain personal jurisdiction over the foreign briber and when the bribes impede U.S. imports. Even when foreign governments are involved at either side of the bribe, neither sovereign immunity, the act of state doctrine, the sovereign compulsion defense, nor the *Noerr-Pennington* doctrine may shield the briber from prosecution.

One final issue remains. Prosecuting foreign bribers under U.S. antitrust laws is likely to generate protests from their home countries. It is difficult to see any justification for such complaints. The home country does not tolerate such conduct directed at its officials or occurring within its borders. To say that the nation where

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331. See, e.g., *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 516 (1972) (defendants' attempt to bar plaintiffs from adjudicatory processes is unprotected by *Noerr* because defendants were not exercising their constitutional rights to petition the government).

332. See, e.g., *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972); *In re Airport Car Rental Antitrust Litig.*, 693 F.2d 84, 85 n.1 (9th Cir. 1982), cert. denied, 462 U.S. 1133 (1983); *Federal Prescription Serv. v. American Pharmaceutical Ass'n*, 663 F.2d 253, 263 (D.C. Cir. 1981), cert. denied, 455 U.S. 928 (1982); *Rangen, Inc. v. Sterling Nelson & Sons*, 351 F.2d 851, 858 (9th Cir. 1965), cert. denied, 383 U.S. 936 (1966); *Dominicus Americana Bohio v. Gulf & Western Indus.*, 473 F. Supp. 680, 686, 690 n.3 (S.D.N.Y. 1979); *Huron Valley Hosp. v. City of Pontiac*, 466 F. Supp. 1301, 1313 (E.D. Mich. 1979), vacated on other grounds, 666 F.2d 1029 (6th Cir. 1981); see also *Sacramento Coca-Cola Bottling Co. v. Chauffeurs, Teamsters & Helpers Local No. 150*, 440 F.2d 1096, 1099 (9th Cir.) (*Noerr-Pennington* does not protect efforts to influence government through illegal means, including threats and other coercive measures), cert. denied, 404 U.S. 826 (1971). But see *BusTop Shelters v. Convenience & Safety Corp.*, 521 F. Supp. 989, 993, 996 (S.D.N.Y. 1981) (campaign contributions did not bring case within sham exception); *Cow Palace, Ltd. v. Associated Milk Producers, Inc.*, 390 F. Supp. 696, 703 n.4, 704 (D. Colo. 1975) (bribes made without ulterior purpose to harm competition did not bring case within sham exception); cf. *Metro Cable Co. v. CATV of Rockford, Inc.*, 375 F. Supp. 350, 358 (N.D. Ill. 1974) (campaign contributions came within *Noerr-Pennington* absent allegations of corruption), aff'd, 516 F.2d 220 (7th Cir. 1975).



the payoff occurs should be the one to impose any sanction is merely to hope that corruption will preclude enforcement. Most important, however, is that if prosecution under the U.S. antitrust laws offends the briber's home country, this is all for the better. It could create some incentive for other trading nations to join in multilateral treaties prohibiting bribery in international trade.